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**DUE PROCESS IN INTERNET
JURISDICTION: LANDING SOFTLY
ON THE OTHER SIDE OF
THE LOOKING GLASS**

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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49TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
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**DUE PROCESS IN INTERNET JURISDICTION: LANDING SOFTLY ON THE
OTHER SIDE OF THE LOOKING GLASS**

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TABLE OF CONTENTS

Table of Contents.....	ii
Abstract.....	iv
Introduction.....	1
What is the Internet?.....	5
Due Process Clause.....	8
Personal Jurisdiction Caselaw.....	10
Jurisdiction Based On Domicile: <i>Pennoyer v. Neff</i>	10
Minimum Contacts and <i>International Shoe</i>	11
“General” vs. “Specific” Jurisdiction.....	14
Fortuitous Circumstances: <i>World-Wide Volkswagen Et. Al. v. Woodson</i>	16
Purposeful Direction: <i>Burger King Corp. v. Rudzewicz</i>	19
The “Effects” Test of <i>Calder v. Jones</i>	23
Due Process Means Fairness.....	26
Cyberspace Jurisdiction Cases.....	27
Lack of Purposeful Availment.....	29
Insufficient Quality and Quantity of Contacts.....	35
Lack of Specific Jurisdiction Connection.....	38
Burden on Nonresident Defendant.....	41
Improper and Insufficient Use of The <i>Calder</i> “Effects” Test.....	43

Internet Defendants In Foreign Country Courts.....	53
Personal Jurisdiction in U.S. Courts Over Foreign Internet Defendants.....	55
U.S. Internet Defendants in Foreign Country Courts.....	60
Choice-of-law Doctrine.....	68
Choice-of-law Analysis Within The U.S.....	69
Choice-of-law Analysis In Foreign Countries.....	71
Enforcement of Judgments.....	73
Conclusion.....	78

ABSTRACT

This thesis will assert that personal jurisdiction due process protection is often inadequate in Internet cases. The modicum of predictability due process offers to nonresident defendants is sometimes Constitutionally insufficient. However, even if a U.S. state court exercises improper jurisdiction over a non-resident defendant in an Internet case, due process protection can be revived at the choice-of-law and enforcement stages of the judicial proceeding. Courts have differing opinions on what constitutes minimum contacts for personal jurisdiction in Internet cases. Courts are generally more likely to exercise jurisdiction over nonresident Internet defendants where the defendant has been malfeasant. Because the Internet is a global communication medium, this thesis analyzes jurisdiction issues globally by discussing judicial proceedings against foreign defendants in U.S. courts and against U.S. defendants in foreign courts. This thesis will first discuss the evolution of personal jurisdiction law in the U.S. so that the reader gains an understanding of Due Process clause jurisdictional protection. Next, this thesis will discuss personal jurisdiction in U.S. Internet cases so the reader understands how courts have applied traditional personal jurisdiction principles to Internet cases. After exploring U.S. caselaw, the thesis will explore Internet caselaw from other countries and compare procedural protections in these countries' courts to those of U.S. courts. Finally, the thesis will discuss how conflicts-of-law and judgment enforcement doctrines link with the Due Process clause to protect Internet defendants both nationally and internationally.

INTRODUCTION

*Something there is that doesn't love a wall,
That sends the frozen-ground-swell under it,
And spills the upper boulders in the sun,
And makes gaps even two can pass abreast.¹*

There is something romantic about a medium that can't be tamed. That medium is the Internet, and it doesn't like walls. It goes around them with ease. Courts are having real problems keeping up with the Internet. The latest challenge to courts has been the application of traditional principles of jurisdiction to Internet jurisdiction cases. Before the court embarks on its case, it must always ask whether it has jurisdiction to hear the case. How and why am I involved, it must decide? It must also determine which law to apply to the dispute. Finally, it must evaluate whether its judgment can be enforced. An unfair judgment may not be enforced by the nonresident defendant's home court. Arriving at the answer to these questions demands intellectual rigor and honesty. Adjudicating these matters is not merely a procedural irritation to be dispensed with as soon as possible. These questions involve fundamental rights of the parties involved. Within the United States, they involve the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Making the wrong decision about whether the court has personal jurisdiction or applying the wrong law means violating the Constitutional rights of one of the parties. Although foreign courts may not care about this, they will care if the defendant's home state won't enforce their judgments because the defendant has not received due process of law. The Due

¹ ROBERT FROST, MENDING WALL (1919), <http://www.bartleby.com/104/64.html>.

Process clause of the Fourteenth Amendment requires that the forum in which the court is deciding a case have personal jurisdiction over the defendant in order for the court to try the case.² According to the Supreme Court in the case of *Pennoyer v. Neff*,³

Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments [with no personal jurisdiction] may be directly questioned, and their enforcement in the state resisted, on the grounds that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.⁴

Some courts have held that a mere presence on the Internet means that the defendant is in fact present in the jurisdiction in which the case is being tried.⁵ Most courts opt for a more reasoned approach, as will be discussed in greater detail later in this thesis. Outside the United States, courts will look to traditional principles of international law to decide whether they can hear a case involving a foreign defendant, including an Internet case.⁶ The court may examine international choice-of-law doctrine to determine which law to apply to the dispute.⁷ The Internet wipes away distances, so it highlights personal jurisdiction problems U.S. courts have been wrestling with for years. These problems spring from an increase in

² *Pennoyer v. Neff*, 95 U.S. 714 (1828).

³ *Id.* at 722.

⁴ *Id.* at 733.

⁵ An example of a case in which a court espoused this opinion is *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 164-65 (D.Conn.1996). The court concluded here that the worldwide availability of the defendant's website meant that the defendant had consented to jurisdiction everywhere, because his website could be viewed anywhere.

⁶ LOUIS HENKIN ET AL., *INTERNATIONAL LAW, CASES AND MATERIALS* 882 (2d ed. 1987).

⁷ EUGENE F. SCOLES, ET AL., *CONFLICT OF LAWS* §512, at 307-09 (3d ed. 2000).

societal mobility.⁸ While at first courts would only exercise jurisdiction over people who were in fact residents of the states in which the court sat, the concept grew with the growth in personal mobility.⁹ When automobile and telephone use became prevalent, state courts began asserting jurisdiction over out-of-state defendants who were increasingly involved in disputes with in-state defendants.¹⁰ Internet cases defy geographical boundaries, but courts are still set up based on geography, so courts must construct new rationales for exercising personal jurisdiction over out-of-state defendants.¹¹ Courts are forced to do this because plaintiffs still have to travel to the courthouse, and they want the courthouse closest to them.

Early on the closest courthouse was reluctant to take jurisdiction over a non-resident defendant. The courthouse has recently become much more willing to do so, especially when the defendant is an Internet corporation. Courts are now taking personal jurisdiction, a legal doctrine that is confusing to begin with, and using different tests when applying it to Internet cases.¹² This makes it even more confusing. In order to understand the current problems with applying personal jurisdiction law to Internet cases, it is necessary to understand how personal jurisdiction law has developed. It is also important to understand how due process

⁸ Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1107 (Summer, 1996).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Dan L. Burk, *Jurisdiction in a World Without Borders*, 1 VA. J.L. & TECH. 3 (Spring, 1997). Burk states in this article that "the advent of global computer networks has rendered geographic boundaries increasingly porous and ephemeral." *Id.*

¹² See Veronica Smith Lewis and Aditi Davis, *Caught In The Web--Can Your Website Expose You To Litigation Almost Anywhere?*, 50 FED'N. INS & CORP. COUNS. Q. 175, 182 (Winter 2000). These authors point out that there is very little binding authority for personal jurisdiction in Internet cases because most of the actions have come out of Federal District Courts.

jurisdictional principles operate, because if a court misapplies them, an Internet defendant¹³ may be able to keep its home state court from enforcing the judgment. Therefore, this thesis will discuss the evolution of personal jurisdiction caselaw, and move on to evaluate how closely courts deciding Internet cases have adhered to this traditional caselaw. The thesis explores both national and international court cases, and discusses how some foreign courts' effects-based jurisdiction may violate due process. Next, the thesis explores choice-of-law theory as a possible solution to the problems of personal jurisdiction law based on geography. If courts must apply the law of the Internet defendant's locale when they take jurisdiction over a nonresident Internet defendant, then it may be possible to more closely adhere to Constitutional Due Process requirements. If courts don't apply the proper choice-of-law analysis, it is possible that the judgment won't be enforced because failing to apply the correct choice-of-law analysis is a due process violation. Court in foreign countries will have to care about adhering to these requirements if they want to get their judgment enforced in the nonresident Internet defendant's home state. This thesis concludes with a discussion of how courts get their judgments enforced, both within the U.S. and internationally, and explains how courts from the defendant's home state can limit enforcement of judgments which violate due process.

¹³ This thesis will use the term "Internet defendant" to refer to a nonresident defendant in legal actions which arise based at least in part on use of the Internet. An "Internet defendant" could refer to a person or a corporation.

WHAT IS THE INTERNET?

First, however, some basic explanation and history of the Internet is in order. The Internet was started in the 1960s from the efforts of work done by Rand Research Corporation in order to find a way that U.S. authorities could communicate with each other in case of a nuclear attack.¹⁴ The Rand Corporation conceived the notion of a communication network similar to a fish net; if one part of the network was obliterated, then the data could go through another path.¹⁵ The Department of Defense's Advanced Research Project (ARPA) actually implemented the communication system, which was later called ARPANET.¹⁶ With ARPANET, messages didn't follow a single route to their destination, but bounced around to different computer nodes¹⁷ at different locations within the network until the message arrived at its destination. Sometimes the system broke the messages into separate parts, which were reassembled at the message destination after each taking separate routes to arrive at their destination.¹⁸ Eventually ARPANET and some related networks became known as the Internet.¹⁹ People connect to the network via computers that in turn are

¹⁴ See Int'l Council of Museums, at <http://www.comlab.ox.ac.uk/archive/other/museums/computing.html> (last visited Mar. 22, 2001).

¹⁵ Ira S. Nathenson, *Showdown at the Domain Name Corral: Property Rights and Personal Jurisdiction Over Squatters, Poachers and Other Parasites*, 58 U.PITT. L. REV. 911, 917 (Summer, 1997).

¹⁶ See *ACLU v. Reno*, 929 F.Supp. 824, 848 (E.D. Pa 1996).

¹⁷ See Webopedia, at <http://webopedia.internet.com/TERM/n/node.html> (last visited Mar. 25th, 2001), which defines a node as: "1) In networks, a processing location. A node can be a computer or some other device, such as a printer. Every node has a unique network address, sometimes called a Data Link Control (DLC) or Media Access Control (MAC) address." *Id.*

¹⁸ See Katherine Neikirk, *Note: Squeezing Cyberspace Into International Shoe: When Should Courts Exercise Personal Jurisdiction Over Noncommercial Online Speech?*, 45 VILL. L. REV. 353, 361 (2000). The Internet continued to use this method of sending information.

connected to computer networks comprising the Internet.²⁰ There is no central control of the Internet; it consists of “thousands of individual networks and organizations, each of which is run and paid for on its own.”²¹ Each user has at least one Internet address, which the Internet Protocol (IP)²² system uses to deliver information from computer to computer.²³ In order to reach the Internet, desktop computers go through an intermediary computer owned by an Internet Service Provider, or ISP.²⁴ Once computers reach the Internet, the computer user can jump from one page to another using hypertext links,²⁵ beginning from a “home page” which is similar to the front cover of a magazine.²⁶ The biggest network within the Internet is known as the World Wide Web, which the Third Circuit defined as “a series of documents stored in different computers all over the Internet.”²⁷ The World Wide Web is so easy to use that many non-technological people publish Web pages available to the world.²⁸ A Web

¹⁹See Neikirk, *supra* note 18, at 361.

²⁰ *Reno*, 929 F. Supp. at 836.

²¹ PRESTON GRALLA, *HOW THE INTERNET WORKS* 5 (1999).

²² See Stephen Fraser, *The Conflict Between The First Amendment And Copyright Law And Its Impact On The Internet*, 16 CARDOZO ARTS & ENT LJ. 53, 57 (1998). Fraser states that Internet Protocol or “IP” is the language that computers in a network use when they exchange information without having to connect. Transmission control protocol, or TCP, is the language that computers use when they have to connect to each other in order to exchange information.

²³ *Id.* at 17.

²⁴ *Id.* at 21.

²⁵See Allison Roarty, *Link Liability: The Argument For Inline Links And Frames As Infringements Of The Copyright Display Right*, 68 FORDHAM L. REV. 1011, 1014 (Dec., 1999). Ms. Roarty states that hypertext links enable an Internet user to connect from one document on the Internet to another, regardless of where the document is located.

²⁶ GRALLA, *supra* note 20, at 127.

²⁷ *ACLU v. Reno*, 929 F.Supp. 824, 836 (E.D. Pa. 1996).

²⁸ *Id.*

page is information that a publisher wants to post, which is stored on a server.²⁹ The computer user who wants to access the Web page uses his browser software in order to connect to the server where the Web page is located.³⁰

More and more people are accessing Web pages. Use of the World Wide Web is growing exponentially. The Internet now unites more than 407 million viewers around the world.³¹ Advertising on the Internet is growing just as fast – it is now a “billion dollar business.”³² The term “cyberspace”³³ has been used to describe the area within which computer networks operate. “Cyberspace” does not really refer to a physical space at all, but rather a conceptual space. Courts have referred to cyberspace as not a space in the way that we understand space, for,

It’s not located anywhere; it has no boundaries; you can’t “go” there. At the bottom, the Internet is really more idea than entity. It is an agreement we

²⁹ Roarty, *supra* note 24, at 1015. Roarty explains that when a computer user’s computer links with a Website, the server on which the website is located transmits the Web page to the computer user, then disconnects from the computer user’s computer. If the computer user clicks on a link within the Web page, the computers reconnect. During this process the server makes several copies of Website information on the computer user’s computer.

³⁰ *Id.*

³¹ NUA INTERNET SURVEYS, http://www.nua.ie/surveys/how_many_online/ (last visited Mar. 27th, 2001). This number is approximately the number of people online as of November 2000.

³² Roarty, *supra* note 24, at 1015.

³³ Katherine C. Sheehan, *Predicting the Future: Personal Jurisdiction in the Twenty-First Century*, 66 U. CIN. L. REV. 385, 440 (Winter, 1998). The author states, “The term cyberspace was coined by William Gibson in his futuristic novel *Neuromancer*.” According to the court in *Hearst v. Goldberger*, No. 96 Civ. 3620 (S.D.N.Y. 1997),

Gibson’s concept included a direct brain-computer link that gave the user the illusion of physically moving about in the data ‘matrix’ to obtain information. In Gibson’s vision, cyberspace is a ‘consensual hallucination that felt and looked like physical space but actually was a computer-generated construct representing abstract data.

Id.

have made to hook our computers together and communicate by way of binary impulses and digitized signals sent over telephone wires.³⁴

Judicial systems based on geography have had a difficult time reconciling their geographically-based jurisdictional systems with legal disputes which arise in a conceptual space. Courts deciding jurisdictional matters over non-resident defendants within the U.S. must comply with the Due Process clause of the Constitution. Complying with the Due Process clause, which guarantees Internet defendants some degree of certainty over the geographical location where they can be sued, is difficult when the dispute occurs in cyberspace.

DUE PROCESS CLAUSE

It is this certainty in the uncertain realm of cyberspace which makes the Due Process clause so valuable to Internet defendants. The Due Process clause of the Fourteenth Amendment states,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.³⁵

The Due Process clause operates as a guarantee to individuals that some sort of process is due before the government takes away life, liberty or property. If life, liberty or property is

³⁴ Blumenthal v. Drudge, 992 F.Supp. 44, 48 (D.D.C. 1998).

³⁵ U.S. CONST. amend. XIV, § 1.

at stake a person is entitled to a fair procedure.³⁶ Not every deprivation requires due process, however. The deprivation with which we are most concerned in Internet cases is the deprivation of property. Most Internet-related disputes are civil in nature, and court cases adjudicating these disputes are going to be deciding on whether or not to separate someone from their property in the form of money, domain names, etc. The definition of property is centered on the concept of entitlement. In order to be entitled to the property, a person must have previously owned the property (prior to the lawsuit) or at least had a claim to it.³⁷ When a court intends to separate someone from his or her property, it owes him or her due process of law. Part of the process due is correct application of personal jurisdiction law.³⁸ If a court lacks jurisdiction to hear a case in the first instance, then it violates Constitutional Due Process by its attempted assertion of jurisdiction, and its decision is void. As the Supreme Court stated in *Pennoyer*,

[I]f the court has no jurisdiction over the person of the defendant by reason of his nonresidence, and consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,-- it is difficult to see how the judgment can legitimately have any force within the state.³⁹

Such void decisions may occur when a court fails to give an individual notice of those actions that would deprive him of life, liberty or property interests protected by the Constitution. Again, the Supreme Court in *Pennoyer* stated,

³⁶ JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 472 (3d ed.1986).

³⁷ Bd. of Regents v. Roth, 408 U.S. 564, 576 (1972).

³⁸ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1828).

³⁹ *Id.*

To give such [judicial] proceedings any validity, there must be a tribunal competent by its constitution – that is by the law of its creation – to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.⁴⁰

Personal jurisdiction revolves around this requirement of proper notice, and the idea of reasonable reach of the court, which affects the defendant's ability to defend his Constitutionally-protected interest in the forum.⁴¹ Just like any other nonresident defendant, the nonresident Internet defendant is entitled to proper notice before being taken into court in a distant state or country.

PERSONAL JURISDICTION CASELAW

Jurisdiction Based On Domicile: *Pennoyer v. Neff*

These notice requirements have been expanded over time. The Supreme Court in *Pennoyer* concluded that, “the tribunals of one State have no jurisdiction over persons beyond its limits.”⁴² According to the *Pennoyer* court, the only constitutional jurisdiction a court could exercise over a non-resident defendant would be jurisdiction *in rem*, or jurisdiction over property of the defendant that which happened to be located in the forum state, related to the dispute. Because the extent of the court's jurisdiction was limited to

⁴⁰ *Id.*

⁴¹ See NOWAK, *supra* note 36, at 472.

⁴² *Pennoyer*, 95 U.S. at 731.

property within the forum, it could order such property be sold to satisfy a judgment, or award that property to an in-state plaintiff, but could not issue a judgment against the non-resident defendant for any value beyond the value of the property. As this thesis will demonstrate later, Internet defendants rarely have any property within the forum state which can be sold to satisfy a judgment, because often their business consists of electrical impulses over wires rather than more tangible assets.⁴³ The Supreme Court later expanded this concept to include quasi-in-rem jurisdiction, which courts take when a defendant has property in the forum that is unrelated to the dispute.⁴⁴ Courts can only use such property to satisfy a judgment when the plaintiff can show exigent circumstance. The Supreme Court stated, however, that it was permissible for a state to require a nonresident to agree to a certain method of service of process, which would then create personal jurisdiction, as a condition of being allowed to do business in that state.⁴⁵

Minimum Contacts and *International Shoe*

The Supreme Court expanded upon this notion in the case of *International Shoe Corp. v. State of Washington*,⁴⁶ another foundational case in personal jurisdiction law. Here the Court found that the defendant's shoe salesmen were agents for service of process. The defendant in this case was a shoe-manufacturing corporation, with its principal place of business in Missouri. The corporation employed thirteen salesmen who sold shoes in

⁴³ Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 16 (1996).

⁴⁴ *Id.*

⁴⁵ *Pennoyer v. Neff*, 95 U.S. 714, 735 (1828).

Washington. The state of Washington sued the corporation for failing to contribute to its unemployment fund. The defendant corporation argued that the Washington court lacked jurisdiction over it because its corporate headquarters were not located in the state of Washington. The defendant's shoe salesmen *did*, however, reside and work in the state of Washington. The state served notice of the suit on the salesmen located in the state. The Supreme Court agreed with the Washington courts that the presence of the defendant's salesmen in the state constituted sufficient "minimum contacts"⁴⁷ with the state for the Washington courts to exercise personal jurisdiction over it. As the Supreme Court in *International Shoe* opined,

Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'⁴⁸

The Court determined the location of the corporate defendant by the location of its agents, who were themselves physically located and doing business in the state of Washington. International Shoe Corporation did a "large volume of interstate commerce"⁴⁹ in the state of Washington through its salesmen, so its contacts with the state were not irregular or casual;

⁴⁶ *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310 (1945).

⁴⁷ *Id.* at 316.

⁴⁸ *Id.*, citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

⁴⁹ *Int'l. Shoe Corp.*, 326 U.S. at 320.

they were in fact “systematic and continuous,”⁵⁰ and resulted in International Shoe receiving the “benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights.”⁵¹ The Supreme Court declared that these contacts established sufficient contacts between International Shoe Corporation and the State of Washington to satisfy the requirements of “fair play and substantial justice.”⁵² Because the contacts satisfied these requirements, the state of Washington’s exercise of jurisdiction came within the limits of the due process clause. As Justice Black stated in his concurrence,

For it is unthinkable that the vague due process clause was ever intended to prohibit a State from regulating or taxing a business carried on within its boundaries simply because this is done by agents of a corporation organized and having its headquarters elsewhere. To read this into the due process clause would in fact result in depriving a State’s citizens of due process by taking from the State the power to protect them in their business dealings within its boundaries with representatives of a foreign corporation.⁵³

Balancing the state’s power to protect its citizens with the non-resident defendant’s right to be able to predict where he will be subject to jurisdiction is a central theme of personal jurisdiction caselaw. The state’s power is not as strong when the non-resident defendant has limited contacts with state residents. However, if the limited contacts are the basis of the lawsuit, then even these limited contacts suffice for personal jurisdiction.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 323.

“General” vs. “Specific” Jurisdiction

The Court in *International Shoe* explains that even limited contacts between the defendant and the forum state can result in specific jurisdiction. The Court distinguishes between “general” and “specific” jurisdiction, evaluating the quality of contacts the non-resident defendant had with the forum state.⁵⁴ An explanation of the types of jurisdiction is important, because courts in recent Internet jurisdiction cases have exercised the more permissive “specific” jurisdiction over non-resident Internet defendants.

First *International Shoe* discussed general jurisdiction. A court can find general jurisdiction when a defendant’s contacts with a state are “continuous and substantial”⁵⁵ enough to allow a court to assert jurisdiction over an action that involves conduct completely different from those contacts. The Court in *International Shoe* describes general jurisdiction when it states,

‘Presence’ in the state . . . has never been doubted when activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued upon, even though no consent to be sued or authorization to an agent to accept service of process has been given.⁵⁶

This has come to be known as general jurisdiction. If a corporation does not have such systematic contacts with a forum state, but the contacts that it does have actually cause the

⁵⁴ *Id.*

⁵⁵ *Int’l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 317 (1945).

⁵⁶ *Id.*

court case, then the court's ensuing jurisdiction is referred to as "special jurisdiction."⁵⁷ The Court goes on to describe special or specific jurisdiction when it states,

Conversely, it has been generally recognized that the casual presence of a corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there . . . To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.⁵⁸

The court takes special jurisdiction when the "isolated items of activities"⁵⁹ which a non-resident defendant has with the forum state are also the basis for the lawsuit. The Court asserts that deciding which type of jurisdiction a court may exercise depends on a thorough examination of the circumstances, noting,

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and the nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which a state has no contacts, ties or relations.⁶⁰

⁵⁷ Nathenson, *supra* note 13, at 931.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 319.

This language indicates that personal jurisdiction inquiries will necessarily be fact-intensive. A court will examine exactly what kind of contacts the nonresident defendant has with the forum state in order to decide whether the defendant has minimum contacts with the state. Such a detailed inquiry can work to the advantage of Internet defendants. It often proves that they don't have the requisite contacts. In order for such defendants to realize the benefit of a detailed inquiry, the court must be willing to assume the burdens of examining and explaining a new technology.

Fortuitous Circumstances: *World-Wide Volkswagen Corp. Et. Al. v. Woodson*⁶¹

Courts in Internet cases must ensure that they don't go beyond the bounds of specific jurisdiction, as the plaintiffs urged the Court to do in *World-Wide Volkswagen*. The Supreme Court reminded the reader that despite relaxation of the more rigid jurisdictional rules of *Pennoyer v. Neff*, significant restrictions on jurisdiction remained.⁶² The plaintiffs in this case, Harry and Kay Robinson, had purchased a new Audi automobile from the defendant Seaway Volkswagen, Inc. (Seaway), in Massena, New York. A year later the Robinson family left their home in New York for a new home in Arizona. Their route to Arizona took them through Oklahoma, where another car hit their Audi in the rear, causing a fire that badly burned Kay Robinson and her two children. The Robinson family sued World-Wide Volkswagen Corporation (the regional distributor for Audi in the New York region) and

⁶¹ *Worldwide Volkswagen Corp. et al. v. Woodson*, 444 U.S. 286 (1980).

⁶² *Id.* at 288.

Seaway Volkswagen in the state of Oklahoma.⁶³ The Court noted that defendant World-Wide had its business office in New York, and distributed Audi vehicles, parts and accessories to retail dealers in New York, New Jersey and Connecticut, but not Oklahoma. According to the Court, neither Seaway nor World-Wide sold products or did any business in the state of Oklahoma. The defendants argued that the state of Oklahoma did not have sufficient minimum contacts with them to enable the Oklahoma court to assert jurisdiction over them. The court below ruled in favor of the plaintiffs on the jurisdictional issue, reasoning that it was foreseeable that the automobile would be used in Oklahoma based on its mobile nature. The Supreme Court reversed, stating that,

[W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma . . . In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.⁶⁴

The Court rejected the lower court's rationale that because it was foreseeable that an automobile sold in New York would end up in Oklahoma, Oklahoma could exercise personal jurisdiction over the defendants. The Court used language critically important for Internet defendants when it asserted,

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant's conduct and connection with the forum State are such that

⁶³ The Robinson family also sued others, including Seaway Volkswagen (the retail dealer), Audi NSU Auto Union Aktiengesellschaft (the manufacturer), and Volkswagen of America (its importer). The Supreme Court case involves only Worldwide and Seaway. The two other defendants were still defendants in the Federal District Court suit pending in Oklahoma. *Id.*

⁶⁴ *Worldwide Volkswagen Corp.*, 444 U.S. at 295.

he should reasonably anticipate being haled into court there. The Due Process clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.⁶⁵

When a corporation has notice of where it is subject to suit, it "can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or if the risks are too great, severing its connection with the state."⁶⁶ Many defendants in Internet cases do not now have the luxury of knowing in which state they are likely to be sued. These defendants lack certainty because of the geographical indeterminacy of the Internet.⁶⁷ They also lack certainty because of court decisions that assert jurisdiction over non-resident Internet defendants merely because their web pages are accessible in the forum state.⁶⁸ Forum courts must apply *World-Wide Volkswagen* more carefully to Internet cases to ensure that nonresident Internet defendants receive the protections that the Supreme Court requires.

⁶⁵ *Id.* at 297, citing *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 319 (1945).

⁶⁶ *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

⁶⁷ See Sheehan, *supra* note 33, at 428. Ms. Sheehan asserts that in transactions over the Internet, the location of potential plaintiffs could be unknowable to potential defendants.

⁶⁸ See *Inset Sys., Inc. v. Instruction Set*, 937 F.Supp. 161 (D.Conn.1996), where the Federal District Court held that the worldwide availability of the defendant's Website meant that the defendant had consented to jurisdiction everywhere. *But see McDonough v. Fallon McElligott, Inc.*, 1996 U.S. Dist. LEXIS 15139, at 7, (S.D. Cal. Aug. 5, 1996), where the Federal District Court states,

Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that Fallon has a Website used by Californians cannot establish jurisdiction by itself.

Id.

Purposeful Direction: *Burger King Corp. v. Rudzewicz*⁶⁹

Although not an Internet case, the Supreme Court case of *Burger King Corp. v. Rudzewicz* compounds uncertainty for Internet defendants. In this case the Court holds that it should be reasonably foreseeable to a nonresident defendant that a state court can exercise jurisdiction over him if he “purposefully direct[s]”⁷⁰ his conduct toward a resident from that state. The nonresident defendant does not need to be physically present at all within the state for the state court to exercise personal jurisdiction over him. This holding is valuable for plaintiffs in Internet cases whose contacts are usually cyber-contacts rather than physical contacts.⁷¹ The plaintiff in *Burger King* was Burger King Corporation, a Florida corporation with its principal offices in Miami. Burger King operated via a franchise system. The governing contracts of the franchise system provided that the franchise relationship was established in Miami and governed by Florida law. Burger King sued one of its franchisees, John Rudzewicz, in the Florida Federal District Court (S.D.FL) for failing to make monthly franchise payments. Rudzewicz had applied for a franchise in Burger King’s Birmingham, Michigan district office and operated his franchise in the Detroit, Michigan area. Rudzewicz and his partner, Brian Macshara, negotiated the franchise both with the Birmingham, Michigan office and with the Florida office. After the franchise was negotiated, the partners

⁶⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

⁷⁰ *Id.* at 475.

⁷¹ See *McDonough*, U.S. Dist. LEXIS 15139 at 8 (where the plaintiff relies on *Burger King Corp.* to help establish his argument that the California Federal District Court should take personal jurisdiction over a Minnesota defendant based on the defendant’s web page and the fact that the defendant had hired some California contractors).

dealt regularly with the Michigan office, although Macshara did attend management training classes in Miami.⁷²

Because they dealt regularly with the Michigan office, the defendants disputed jurisdiction in Florida. They asserted that they were not Florida residents and the dispute did not arise in Florida, so the Florida court did not have jurisdiction to hear the case. The Court disagreed with the defendants, and recognized that “a substantial amount of business is conducted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.”⁷³ The Court further stated,

The Due Process Clause protects an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties or relations.’ By requiring that individuals have ‘fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign,’ the Due Process Clause ‘gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’ Where a forum seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, this ‘fair warning’ requirement is satisfied if the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.⁷⁴

By doing business with a Florida corporation, the Court held that the defendants should have known that they could be sued in a Florida court. The Court asserted,

⁷² *Burger King Corp.*, 471 U.S. at 475.

⁷³ *Id.*

⁷⁴ *Id.* at 471-472

Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State. Thus where the defendant 'deliberately' has engaged in significant activities within a State, or has created 'continuing obligations' between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.⁷⁵

The 'substantial connection' that the defendant creates does not have to be manifested by actual physical contacts, therefore. The Court says that, "So long as a commercial actor's efforts are 'purposefully directed' towards residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."⁷⁶ The Court in *Burger King* looked at the facts of the case and determined it was reasonable to assume the defendant knew he was doing business with a Florida corporation. It based its decision on the franchise contract documents, correspondence between the parties, and the fact that the agreements were made in and enforced from Florida. The Court determined that because the defendant knew he was doing business with a Florida corporation, he had purposefully directed his actions to residents of the state of Florida.

By not even requiring physical contacts, the Court appears to be moving far away from the bright line rule, found in early cases, such as *Pennoyer v. Neff*.⁷⁷ The early cases simply focused on whether the defendant was physically located in the forum state. Now the Court is looking at the defendant's circumstances to determine fairness of jurisdiction rather than

⁷⁵ *Id.* at 475.

⁷⁶ *Id.* at 476.

⁷⁷ *Pennoyer v. Neff*, 95 U.S. 714, 720 (1828).

the defendant's physical location. By looking at the defendant's circumstances in each case, the Court moves away from a bright line rule to an outcome determined by the defendant's circumstances. The test is still one of basic fairness and reasonable foreseeability, but the Court is no longer willing to judge fairness and reasonable foreseeability based solely on the defendant's physical location, or even whether the defendant had physical contacts with the forum state.

Basic fairness gets another chance in *Burger King Corp.* when the Court shifts its focus to whether the Florida court's assertion of personal jurisdiction would "comport with 'fair play and substantial justice.'"⁷⁸ The Court states that "the court 'in appropriate [cases] may evaluate 'the burden on the defendant,' 'the forum State's interest in obtaining convenient and effective relief,' the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the shared interest of the several States in furthering fundamental substantive social policies.'"⁷⁹ One of the suggestions given by the Court for addressing the issue of the "shared interest of the several states in furthering substantive social policies" was to apply the forum's choice-of-law rules.⁸⁰ Later this paper will address how applying the law from the defendant's home state could help alleviate the jurisdictional burden on an Internet defendant of responding to a lawsuit in a distant jurisdiction.

⁷⁸ *Burger King Corp.*, 471 U.S. at 476, citing *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 320 (1945).

⁷⁹ *Burger King Corp.*, 471 U.S. at 476, citing *Worldwide Volkswagen Corp. et al. v. Woodson*, 444 U.S. 286, 292 (1980)

⁸⁰ *Burger King Corp.*, 471 U.S. at 477.

At this point the jurisdictional burden appears rather heavy for an Internet defendant. The Supreme Court has said all that is required for a court to assume jurisdiction over a non-resident defendant is that the defendant's acts be "purposefully directed" towards the forum state, and no physical contacts are required. However, in order to purposefully direct one's actions to a forum state, one must know that the company or person with whom one is dealing is from that state. As will be discussed in greater detail later in this paper, often Internet defendants do not know in which state the person with whom they are dealing is located because the person's Internet address may not have any relation to their physical address.

The "Effects" Test of *Calder v. Jones*⁸¹

One can "purposefully direct" one's actions to a forum state by directing intentionally tortious behavior to someone in that state. This theory of jurisdiction, known as the *Calder* "effects" test,⁸² is relevant to this thesis because courts deciding cases against non-resident Internet defendants may assert jurisdiction because the effects of the Internet dispute are felt in their forum.⁸³ The notion is that a tortfeasor creates minimum contacts by his conduct, purposefully directed at the plaintiff. Forum courts find purposeful availment from a

⁸¹ *Calder v. Jones*, 465 U.S. 783 (1984).

⁸² Neikirk, *supra* note 18, at 359-360. Ms. Neikirk notes that the test comes from the case of *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). This thesis will refer to this test throughout by calling it the *Calder* "effects" test.

⁸³ *See* *Cal. Software Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1361-62 (C.D. Cal. 1986) (where the Federal District Court held that because the nonresident defendant had defamed the California plaintiff over the Internet, the defendant's acts were "purposefully directed" to the plaintiff in California, so a California court could exercise jurisdiction). *See also* *Euromarket Designs Inc. v. Crate & Barrel*, 96 F. Supp. 2d 824, 835

defendant's intentionally tortious behavior toward someone in that forum. Courts reason that intentionally tortious behavior makes it foreseeable to the defendant that he could be haled into his adversary's state court.⁸⁴ The Supreme Court in *Calder v. Jones* found that personal jurisdiction was proper where a California court took jurisdiction over a libel case against Florida residents who wrote and published a negative story about Shirley Jones, a famous actress.⁸⁵ The story alleged that Jones drank very heavily, and therefore couldn't fulfill her professional obligations. The Court found that because Calder, the editor of *National Enquirer* magazine which published the story, had directed his libelous behavior toward Shirley Jones, a resident of California, he had directed it toward California. Accordingly, the Court found that Calder had purposefully availed himself of the California forum, and therefore jurisdiction in California was proper. Because the effects of the tort were felt in California, the Court reasoned that it was appropriate for the California court to assume jurisdiction. The Court based jurisdiction upon the fact that the editor knew that the harm would be felt in California, because he knew Shirley Jones lived in California. The decision turned on the notion of foreseeability; that the editor's conduct should have put him on notice and made it foreseeable to him that he could be haled into court in the state of California to answer Ms. Jones' allegations. As the Court noted about the defendants,

[T]heir intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that

(N.D. Ill., 2000) (where the Illinois Federal District Court asserted personal jurisdiction over an Irish defendant based on the *Calder* "effects" test).

⁸⁴ See *Keeton v. Hustler Magazine*, 465 U.S. 770, 773-74 (1984), where the Supreme Court found that a New Hampshire court properly asserted jurisdiction when a small portion of defendant's allegedly defamatory magazines circulated in the forum state, even though neither the defendant nor the plaintiff resided in the state. The Court held that the defendants should have "reasonably anticipated" being called into New Hampshire court for libelous comments when they continually exploited the New Hampshire market. *Id.*

⁸⁵ *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).

they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article.⁸⁶

The defendants in this case argued on the basis of *World-Wide Volkswagen* that the foreseeability that the magazine would be "circulated and have an effect in California" should not be enough to give California jurisdiction.⁸⁷ The Court rejected this argument, finding that jurisdiction was satisfied by the defendants' acts being "expressly aimed at California."⁸⁸ The Supreme Court's rejection of this argument is significant for Internet jurisdiction cases. An Internet jurisdiction case has not yet been decided by the Supreme Court. However, it appears that the Court in such a case would reject an argument by plaintiffs for jurisdiction based on the mere availability of the Web page in the forum state, like the mere availability of the National Enquirer in *Calder*. The Court would likely require that the Internet defendant be more involved with the forum state; that the defendant's conduct specifically affect the forum state rather than all geographic areas indeterminately. Lower courts which have heard Internet cases sometimes are split, as will be discussed in greater detail later, with some finding that a nonresident defendant's web page alone creates jurisdiction in a forum state.

⁸⁶ *Id.* See also *Indianapolis Colts, Inc. v. Metro. Balt. Football Club, L.P.*, 34 F.3d 319, 411 (7th Cir. 1994). The 7th Circuit in this case made it unclear whether the defendant actually had to know where the plaintiff resided by stating, "Since there can be no tort without an injury, the state in which the injury occurs is the state in which the tort occurs, and someone who commits a tort in Indiana should . . . be amenable to suit there." *Id.* at 411-412.

⁸⁷ *Calder*, 465 U.S. at 789.

Due Process Means Fairness

These lower courts will eventually realize that it isn't fair to exercise jurisdiction over nonresident Internet defendants based merely on the defendant's untargeted website. The previous cases demonstrate that the Supreme Court's test for personal jurisdiction while at first seeming rather labyrinthine, on closer examination simply boils down to fairness. A court determines whether it is subjectively and objectively fair to assert jurisdiction over a non-resident defendant. The difficulty in applying this test lies in the determination of whether such an assertion is fair. The court must weigh the facts in each case to determine whether personal jurisdiction would comport with "fair play and substantial justice."⁸⁹ Even the Supreme Court recognizes that this approach does not provide "a bright line rule which will assist in arriving at decisions."⁹⁰ Commentators have described this analysis as "a black art."⁹¹ Now courts are faced with applying complicated personal jurisdiction criteria to cases arising in cyberspace, which has complications of its own, as this thesis will demonstrate in the next section.

⁸⁸ *Id.*

⁸⁹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 486 (1985), citing *Kulko v. Cal. Super. Ct.*, 436 U.S. 84, 92 (1978).

⁹⁰ *Burger King Corp.*, 471 U.S. at 486.

⁹¹ Burk, *supra* note 8, at 1109.

CYBERSPACE JURISDICTION CASES⁹²

Most courts deciding Internet jurisdiction cases agree that these cases fall along a spectrum.⁹³ At one end of the spectrum are cases in which the defendants merely post a Web page on the Internet.⁹⁴ At the other end defendants are actively engaged in doing business over the Internet.⁹⁵ In the former line of cases, courts have tended not to find jurisdiction,⁹⁶ while in the latter, courts have asserted jurisdiction.⁹⁷ Between these two extremes lie cases in which defendants have established interactive Web sites,⁹⁸ but have not yet formed any contracts with forum residents.⁹⁹ Courts' assertion of jurisdiction in such cases seems to depend on the amount of "interactivity" between forum residents and the defendant's website.¹⁰⁰ Not all courts use this spectrum, however. Some courts try to measure the

⁹² These are cases in which the court action arises from a dispute involving the Internet in some manner. For example, in some cases the dispute occurs when a Web page displays a name which someone else owns the trademark, as in the case of *Bensusan Rest. Corp. v. King*, 937 F.Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir.1997). Some cases arise when defamatory material is published on the Internet, as was the allegation in *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). Although the parties each reside in a geographic location, of course, it is often challenging for courts to ascertain whether it is reasonable to exercise jurisdiction over a nonresident defendant when the defendant's interaction with the Internet took place in the defendant's home state.

⁹³ See *Zippo Manuf. Co. v. Zippo Dot Com*, 952 F.Supp. 1119, 1126 (W.D. Pa. 1997).

⁹⁴ See, e.g., *Inset Sys., Inc. v. Instruction Set*, 937 F.Supp. 161 (D.Conn.1996).

⁹⁵ See, e.g., *Euromarket Designs Inc. v. Crate & Barrel*, 96 F. Supp. 2d 824, 835 (N.D. Ill., 2000).

⁹⁶ See *Weber v. Jolly Hotels*, 977 F.Supp at 327, 334 (1997) (finding that exercising personal jurisdiction over a defendant based merely on their website advertisement violated due process).

⁹⁷ See *Euromarket Designs, Inc.*, 96 F.Supp. at 835.

⁹⁸ See GRALLA, *supra* note 13, at 125. Gralla defines interactive forms are those which require the Website visitor to register at a site before being allowed to download particular software or images.

⁹⁹ See *Maritz v. Cybergold, Inc.*, 947 F.Supp. 1328, 1333 (E.D. Mo. 1996), where the defendant operated a website at www.cybergold.com which informed people about its upcoming Web business and asked them to add their names to a mailing list for further information. The court in this case found that the Website was interactive enough for the court to assert jurisdiction, based on the purposeful availment analysis. .

minimum contacts a nonresident defendant has with the forum without using the spectrum, some use the *Calder* “effects” test, and some use a jumbled combination of tests. Courts deciding cyberspace jurisdiction cases tend to find specific jurisdiction over non-resident defendants rather than general, because the Internet entity¹⁰¹ is usually not considered to be doing enough business within the forum state to justify the assertion of general jurisdiction.¹⁰² Just because the technology is new to courts in Internet cases doesn’t mean that personal jurisdiction law can be new, also.

Courts in Internet cases violate due process in several ways. First, sometimes they decide that nonresident Internet defendants have purposefully availed themselves of a forum without determining that the defendant even knew where the plaintiff was geographically located. It may not even be possible for a defendant to discover where a plaintiff is located because of the geographical indeterminacy of the Internet. Second, some courts find the quantity and quality of Internet contacts sufficient despite Supreme Court caselaw which would indicate the contrary. Third, some courts assert specific jurisdiction over Internet defendants without

¹⁰⁰ See *Blumenthal v. Drudge*, 992 F.Supp. 44, 56-57 (D.D.C. 1998). The D.C. Federal District Court describes Internet interactivity when it states,

The Drudge website allows browsers, including District of Columbia residents, to directly E-mail defendant Drudge, thus allowing an exchange of information between the browser’s computer and Drudge’s host computer. In addition, browsers who access the website may request request subscriptions to the Drudge Report, again by directly e-mailing their requests to Drudge’s host computer. In turn, as each new edition of the Drudge report is created, it is then sent by Drudge to every e-mail address on his subscription mailing list, which includes the e-mail addresses of all browsers who have requested subscriptions by directly e-mailing Drudge through his website. The constant exchange of information and direct communication that District of Columbia Internet users are able to have with Drudge’s host computer via his website is the epitome of website interactivity. *Id.*

¹⁰¹ An Internet entity describes any person logged on to the World Wide Web. The person could be doing business over the Internet, perhaps working for a corporation, or it could be a person “surfing” the Web as a form of entertainment or education.

¹⁰² See *Cal. Software Inc. v. Reliability Research, Inc.*, 631 F. Supp. 1356, 1360 (1986).

demonstrating that the lawsuit actually came from the contacts that the Internet defendant had with the forum state. Fourth, courts tend to downplay the burden on the nonresident defendant from having to defend the case in a distant jurisdiction. Fifth, often courts deciding Internet cases don't use the *Calder* "effects" test to establish jurisdiction when they can, and sometimes they use it improperly. It appears in these cases that using the "effects" test would make the assertion of jurisdiction more legally sufficient. Instead of using the "effects" test, though, these courts instead try to establish jurisdiction over nonresident Internet defendants using a more traditional "minimum contacts analysis." Because one of the core requirements of personal jurisdiction over nonresident defendants is that the defendant "purposefully avail"¹⁰³ itself of the forum state, this thesis will begin by discussing deficiencies in this area.

Lack of Purposeful Availment

The U.S. cases that likely make Internet businessmen worry about lawsuits are ones like *Inset Systems Inc. v. Instruction Set*.¹⁰⁴ Cases of this type hold that because an Internet defendant has a website, the defendant has purposefully availed itself of every forum, so should expect to be sued anywhere. In *Inset Systems*, a Connecticut corporation called Inset Systems sued Instruction Set, a Massachusetts corporation for trademark infringement. The Federal District Court (D.Conn) found personal jurisdiction existed over the non-resident Massachusetts corporation because it had posted a Web page accessible to Internet users in

¹⁰³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). See also *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984); *Worldwide Volkswagen Corp. et al. v. Woodson*, 444 U.S. 286, 299 (1980).

Connecticut. The court reasoned that because the Web page was accessible to people in Connecticut (as well as everywhere else), Instruction Set had purposefully availed itself of the market in Connecticut, and therefore it was reasonably foreseeable to it that it could be called into court anywhere its web page could be accessed. Instruction Set listed an 800 telephone number on its website, which the court saw as additional evidence that the defendant intended to establish links with people from other states. Of course, the defendant had not specifically targeted Connecticut when it posted its website. Rather, it intended to make its products available to everyone via the Internet, not just to Connecticut residents. The court cited no evidence that anyone in Connecticut had actually interacted with the defendant on its website. It seems that there is no way the defendant could have reasonably foreseen that it would have gotten called into court in Connecticut. Unlike the Supreme Court in *Burger King*, where the “purposeful availment” standard is explained in detail, the Connecticut District court in *Inset* did not establish that the defendant had any actual contacts with the plaintiff. The Court in *Burger King* at least showed that the defendant’s associate had training in Florida, the forum state.¹⁰⁵ The Court also noted that the defendant had to send payments to the plaintiff in the forum state, which demonstrated that the defendant at least knew where the organization with which they were doing business was headquartered. The *Inset* court didn’t require that the plaintiff demonstrate that the defendant reasonably knew where the plaintiff was located. The *Inset* court thought that because the defendant had a web page that could be accessed from anywhere, it should foresee being called into court anywhere. This case has been criticized as being “devoid of any meaningful due process

¹⁰⁴ *Inset Sys., Inc. v. Instruction Set*, 937 F.Supp. 161, 165 (D.Conn.1996).

¹⁰⁵ *Burger King Corp.*, 471 U.S. at 480-481.

analysis.”¹⁰⁶ The *Inset* court fails to follow the admonishment from the Supreme Court in *World-Wide Volkswagen*,

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum state. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.¹⁰⁷

The *Inset* court should have realized personal jurisdiction rested on a specific relationship between the defendant and plaintiff that was not present in the *Inset* case, not on the fortuitous viewing of the defendant’s website by the plaintiff. *Inset* demonstrates how far a court is willing to go in order to assert jurisdiction over a non-resident defendant in an Internet case.¹⁰⁸

Even if an Internet defendant does establish a personal relationship out of which a dispute arises, the defendant would likely have no way of finding out where the party with whom it was transacting was geographically located, according to Professor Dan Burk.¹⁰⁹

¹⁰⁶ Burk, *supra* note 8, at 1136, 1160. See also Michael A. Geist, *The Reality Of Bytes: Regulating Economic Activity In The Age Of The Internet*, 73 WASH. L. REV. 521, 533 (July, 1998). Geist opines that the *Inset* court greatly stretched the meaning of “purposefully directing” one’s behavior toward a forum in Internet cases. He also criticizes the *Inset* court for failing to analyze the Internet itself, but instead analogizing to other media forms, like television, and thereby incorrectly viewing the Internet as continuous advertising.

¹⁰⁷ *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

¹⁰⁸ See also *Heroes Inc. v. Heroes Foundation*, 958 F. Supp. 1, 3-4 (D.D.C. 1996) (where the D.C. District Court asserted personal jurisdiction over a New York charitable organization that was sued by a District of Columbia charity for trademark infringement because it placed advertisements in the Washington Post and maintained a Web page accessible from the District of Columbia); *Haelon Products, Inc. v. Beso Biological Research, Inc.*, 1997 U.S. Dist. LEXIS 10565, at 14 (E.D. La. 1997) (holding that the nonresident defendant was subject to jurisdiction in Louisiana because of its website, its toll-free telephone number, and its advertisements in four national publications); *Telco Communications v. An Apple A Day*, 977 F.Supp. 404, 406-07 (E.D. Va.) (asserting jurisdiction over a Missouri defendant which allegedly defamed a Virginia corporation on the defendant’s website because the website could be accessed by a Virginia resident).

The username¹¹⁰ and/or Internet Service Provider location does not necessarily indicate where the customer is located. The Internet system is based on computers interacting with each other. The computer speaking to another computer cannot necessarily detect in which geographical location the computer is in – the Internet was not set up with geographical identifiers.¹¹¹ An Internet address is usually devoid of geographical information,¹¹² so users can't screen on the basis of an Internet address.¹¹³ Even if some kind of screening mechanism were developed enabling a computer to ascertain the location of the computer with which it was communicating, the actual human user of that computer may not physically be at the same location as the computer. The computer user could remotely log on to the Internet from a different place than where he normally logs on, and his Internet address would not indicate the change.¹¹⁴ For example, if an individual were to log onto the Internet from a laptop computer, issued by the Army Judge Advocate General's School, the computer with which it was interacting with would think that it was signing on from Charlottesville,

¹⁰⁹ Burk, *supra* note 8, at 1110. Burk asserts that the Internet is actually structurally indifferent to geography, and therefore it is very difficult to tell where someone is physically located. Most online disputes will require an *International Shoe* minimum contacts analysis. If a business is ignorant of a plaintiff's physical location, it will be very difficult for a court to assert that the business purposefully availed itself of that forum.

¹¹⁰ According to Webopedia, the definition of a username is "A name used to gain access to a computer. Usernames, and often passwords, are required in multi-user systems. In most such systems, users can choose their own usernames and passwords." See Webopedia, at <http://isp.webopedia.com/TERM/u/username.html> (last visited Mar. 26, 2001).

¹¹¹ Burk, *supra* note 8, at 1110.

¹¹² *Id.* Burk points out that although some identifiers are available in an Internet address; ".uk" in the Internet address could indicate that the computer on which the website is located is in England, for example. However, Professor Burk describes these identifiers as "eminently portable" (*Id.* at 1112), meaning that while the website may have originated in the U.K., it does not necessarily mean that the computer on which the address is physically located is still there. Burk describes these addresses as "logical addresses on the network" rather than "physical addresses in real space." *Id.* It is possible that the creator of the website does not need to physically move, but can move his website to a server in a geographic location different from that indicated in his website address. *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Virginia, when in fact it could be located anywhere. Of course, the computer with which it was interacting (an Internet company, for example) could ask where the person with whom they are transacting is located, but it would be difficult to check and see if they were telling the truth. The only way to possibly determine whether a person is actually in a particular state is to confirm the transaction with a telephone call, which detracts from the utility of using the Internet in the first place.¹¹⁵ So it seems that geography is meaningless on the Internet, and transactors very often have no idea, and *no efficient way of discovering* the physical location of the party with whom they are dealing.¹¹⁶ It becomes difficult for parties to structure their behavior in such a way as to ensure that it does not render them liable to suit in another jurisdiction when they don't know what that jurisdiction is.¹¹⁷ A court's assertion that jurisdiction is appropriate when a non-resident Internet actor "purposefully directed" his or her conduct toward a particular forum, based on the Supreme Court case of *Burger King Corp. v. Rudzewicz*,¹¹⁸ becomes meaningless when the Internet actor did not and could not know what their forum was. Even if an Internet actor could determine where a person with whom they are transacting is physically located, it is quite possible that the person is cloaking their identity and location by using cryptographic tools¹¹⁹ or a remailer operator,¹²⁰ tools

¹¹⁵ *Id.*

¹¹⁶ See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1223 (Fall, 1998). This author contends that technology could be developed to help identify the geographic location of an Internet user. He describes those who contend geography defies Internet regulation as "skeptics." He says that software which discriminates on the basis of geographic location would not be hard to develop on the blueprint of other discriminatory software, such as parental-control software. *Id.*

¹¹⁷ See *Worldwide Volkswagen Corp. Et Al. v. Woodson*, 444 U.S. 286, 297 (1980).

¹¹⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

¹¹⁹ See Michael A. Froomkin, *The Metaphor Is The Key: Cryptography, The Clipper Chip, And The Constitution*, 143 U. PA. L. REV. 709, 713. Froomkin describes cryptography as, "the art of creating and using methods of disguising messages, using codes, ciphers, and other methods, so that only certain people can see

which are widely available.¹²¹ Any attempt by a forum's court or government to exclude forum residents from a website can be avoided, it seems, by a determined website viewer from that forum. The citizen of a restrictive state could simply reconfigure his or her connection. While it might appear that the citizen is physically located in Australia, for example, because the Internet address has a "com.au" at the end, the whole operation could actually be located in the United States.¹²² Perhaps the website or the citizen was originally located in Australia, but either one of them could move. The citizen could physically move and retain the same address. In the alternative, he could send his website to a server located outside the country, yet the website would retain the same address. The Internet performs just as it was designed; allowing users to go around geographic obstacles with ease.

The requirement that a nonresident defendant purposefully avail himself of a forum is being given short shrift. Some courts, like *Inset*, don't even require that a nonresident defendant target the forum state in order to find purposeful availment. It is not even clear that an Internet defendant can target a particular state because the Internet usually does not

the real message." *Id.* Cryptographic tools are those which disguise the identity of the computer user or other data via special codes. For example, Froomkin describes the "Clipper" chip offered by the government to the private sector. The "Clipper" chip encrypts data to make it unavailable to those not authorized access. Geographic information could also be encrypted. *Id.*

¹²⁰ See Paul A. Strassmann, *Risk-Free Access Into The Global Information Infrastructure Via Anonymous Re-Mailers*, HARVARD UNIVERSITY, KENNEDY SCHOOL OF GOVERNMENT, SYMPOSIUM ON THE GLOBAL INFORMATION INFRASTRUCTURE: INFORMATION, POLICY & INTERNATIONAL INFRASTRUCTURE CAMBRIDGE, MA, JANUARY 28-30 (1996). Mr. Strassman describes an anonymous re-mailer as a computer program which receives the sender's e-mail, scrubs the sender's name and address, and then sends it on to another party which who does not know where the message originally came from. Sometimes the message is sent through two or more addresses before it reaches its destination so it is even harder to trace.

¹²¹ Bernadette Jew et al., *Australia, Cyber Jurisdiction – Emerging Issues and Conflicts of Law When Overseas Courts Challenge Your Web: Part 1 of 3 Parts*, MONDAQ BUSINESS BRIEFING, §1.5 (2000), citing A. Michael Froomkin, *Anonymity and its Enemies*, 1995 J. ONLINE L. 4, at <http://warthog.cc.wm.edu/law/publications/jol/froomkin.htm>.

¹²² Jew, *supra* note 119, at §1.7.

indicate where parties are geographically located. Even if courts can show that the Internet defendant actually had contacts with a forum state, often these contacts are Constitutionally insufficient because they don't comport with the due process clause.

Insufficient Quality and Quantity of Contacts

Some courts deciding Internet jurisdiction issues go too far over the due process edge when they determine that the quality and quantity of minimum contacts are sufficient to satisfy due process. In Internet cases, like *Zippo Manufacturing Co. v. Zippo Dot Com*,¹²³ for example, courts tend to find that contracts alone are a sufficient basis for minimum contacts.¹²⁴ However, the mere formation of a contract, without more, does not necessarily give a court personal jurisdiction over a non-resident defendant.¹²⁵ In *Zippo*, the Federal District Court for the Western District of Pennsylvania decided Pennsylvania should assume jurisdiction over an Internet domain name¹²⁶ dispute. The case involved two "Zippo"

¹²³ *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1126 (W.D. Pa. 1997). The court in *Zippo* found that the primary minimum contacts supporting personal jurisdiction over the nonresident Zippo News Service were Zippo's news service contracts with forum residents and its contracts with forum state Internet Service Providers. *Id.* at 1119.

¹²⁴ *Id.*

¹²⁵ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985). See also *Panavision Int'l. L.P. v. Toeppen*, 938 F. Supp. 616, 620-21 (C.D. Cal. 1996), for an example of an Internet case where the court states that a contract between a resident and a forum state alone do not create specific jurisdiction. *Id.*

¹²⁶ See Sheehan, *supra* note 33, at 422-23. Sheehan gives an excellent definition of "domain name." She states,

A domain name is a textual string used to identify the "Internet protocol" or "IP" address of a particular computer or network of computers on the Internet. Domain names are easier to remember (and to type) than the computer-readable strings of digits for which they substitute. In many cases, an entity's domain name includes the entity's own name or a form thereof; for example, *ibm.com* is IBM's domain name. Typing "*www.ibm.com*" into a web browser is a much quicker, easier, and more reliable way to find IBM's web page than relying on an Internet search engine, which is likely to turn up not only the page sought, but several

corporations. One was a Pennsylvania manufacturing plant which made Zippo lighters, among other things, and the second was an Internet news service with its website based in California.¹²⁷ Zippo news service allowed several levels of access, including an “Original” and “Super” level of service, for which Internet viewers had to subscribe and pay. The court found that 3,000 subscribers to the Zippo news service resided in Pennsylvania, and that the Internet company had entered into seven agreements with Internet Service Providers¹²⁸ in the state of Pennsylvania so their subscribers could access the news service. The court examined the Pennsylvania long-arm statute¹²⁹ to decide whether it authorized Pennsylvania courts to take jurisdiction over the case. The statute provided, in relevant part, that Pennsylvania courts could take jurisdiction over non-resident defendants who were “Contracting to supply services or things in this Commonwealth.”¹³⁰ Under the facts, the court found this requirement easily satisfied. The court applied the three-prong test from *Burger King Corp. v. Rudzewicz*¹³¹ to determine whether the exercise of specific personal jurisdiction over the

thousand others as well. No two domains can have the same name, any more than two telephone lines can have the same number.

Id.

¹²⁷ *Zippo Mfg. Co.*, 952 F.Supp. at 1121.

¹²⁸ See note 15, *supra*, for an explanation of “Internet Service Provider.”

¹²⁹ A long-arm jurisdiction statute is a state statute that authorizes state courts to assert personal jurisdiction over nonresident defendants up to the limits of the Due Process clause. The state statute may even be narrower than the Due Process clause, authorizing states to assert personal jurisdiction up to a limit short of Due Process clause limitations. A long- arm statute only allows a state court to exercise specific jurisdiction over nonresident defendants, not general jurisdiction. See *Sheehan*, *supra* note 33, at 389.

¹³⁰ *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119, 1122 (W.D. Pa. 1997), citing the Pennsylvania long arm jurisdiction statute.

¹³¹ See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). The test is: (1) the defendant must have sufficient “minimum contacts” with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable. *Id.* According to the *Zippo* court, “The ‘Constitutional touchstone’ of the minimum contacts analysis is embodied in the first prong, ‘whether the defendant purposefully established’ contacts with the forum state.” *Zippo Mfg. Co.*, 952 F.Supp. at 1122-23.

non-resident California corporation was proper. To find minimum contacts, the first prong of the test, the court looked at whether the defendant Zippo News Service had purposefully availed itself of the Pennsylvania forum. The court examined the specific contacts between the defendant and residents of the forum. It found the contacts to be the subscription contracts and the ISP contracts that Zippo news service had entered into with Pennsylvania residents. The *Zippo* court reviewed other Internet jurisdiction cases, to see how these other courts had applied traditional jurisdictional analysis to Internet cases. The court found that this case fit into the line of cases in which defendants were actually doing business over the Internet. Despite the defendant's contention that its Zippo news service website was passive, the court was unpersuaded. The court found that Zippo news service had purposefully availed itself of the Pennsylvania forum by entering into contracts with Pennsylvania residents. The court cited *World-Wide Volkswagen* for the proposition that "when a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there.'"¹³² Because the defendant had purposefully availed itself of the Pennsylvania forum by entering into contracts with residents of Pennsylvania, the court found that Pennsylvania had jurisdiction over the case.¹³³

The Supreme Court in *Burger King* required something other than the contract alone to decide that it was reasonably foreseeable to the defendant in this case that he would be sued in the state of Florida.¹³⁴ In *Burger King*, the Court also looked to the fact that the defendant had attended a training course in Florida, had sent mail to the plaintiff, and had

¹³² *Zippo Mfg Co.*, 952 F.Supp. at 1122-23 (citing *World-Wide Volkswagen*, 444 U.S. at 297).

¹³³ *Id.* at 1127.

been told by the Minnesota Burger King office that the main office was in Florida.¹³⁵

Although *Burger King* wasn't an Internet case, it was a Supreme Court case, and thus courts in Internet cases must adhere to it. In *Zippo* the contracts weren't even between the plaintiff and the defendant as was the contract in *Burger King*. The quality of contacts in *Zippo* is much lower than the contacts in *Burger King*.

Perhaps the *Zippo* court is trying to make up for quality deficiencies by citing to the quantity of contracts Zippo news service had with forum residents¹³⁶ as a factor favoring the exercise of specific jurisdiction. According to the Supreme Court in *International Shoe*, however, the test has always focused on the "nature and quality"¹³⁷ of the contacts with the forum and not the quantity of those contacts.¹³⁸

Lack of Specific Jurisdiction Connection

Not only did the *Zippo* court falter when determining that the contacts were sufficient, but also when determining that the lawsuit arose from these contacts. The standard the Supreme Court set for specific jurisdiction in *Helicopteros Nacionales* is fairly narrow.¹³⁹

¹³⁴ *Id.*

¹³⁵ *Id.* at 480-481.

¹³⁶ See *id.* at 1126, where the *Zippo* court says "Defendant has sold passwords to approximately 3,000 subscribers in Pennsylvania and entered into seven contracts with Internet access providers to furnish its services to their customers in Pennsylvania." *Id.* See also *Maritz*, 947 F.Supp. at 1333, where the court notes that "defendant has transmitted information into Missouri regarding its services approximately 131 times." *Id.*

¹³⁷ *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 320 (1945).

¹³⁸ *Id.*

The Supreme Court in *Helicopteros Nacionales* acknowledged that the Columbian defendant had purchased several helicopters from the plaintiff corporation, but held that these purchases did not enable the Texas court to assert specific jurisdiction over the defendant because they were unrelated to the plaintiff's cause of action.¹⁴⁰ Similarly, the *Zippo* court fails to make the narrow connection between the contacts the defendant had with the forum state and the lawsuit.¹⁴¹

The *Zippo* court made the requisite finding that the cause of action arose from the defendant's activities in the case.¹⁴² This finding is faulty. The court made this finding to satisfy the second prong of the *Burger King* test,¹⁴³ and also to satisfy the requirements of specific jurisdiction.¹⁴⁴ The first problem with this finding is that the *Zippo* court lists contacts between the defendant and the forum state that are not even between the defendant and the plaintiff, but between the defendant and third party forum residents. It is not clear how the court can find specific jurisdiction under the *Helicopteros Nacionales* standard when

¹³⁹ *Helicopteros Nacionales De Colom. v. Hall*, 466 U.S. 408, 416 (1984). The Supreme Court found in this case that a Texas corporation's purchases of helicopters and helicopter transport services from a Columbian helicopter company (Helicol) did not give the Texas court jurisdiction over the lawsuit when the purchases were not related to the lawsuit. This lawsuit arose from a helicopter crash in Peru, in which four U.S. employees of an oil exploration company died. Their relatives sued Helicol in Texas for the helicopter crash (this case did not involve the Internet). The Court held that the one trip that the defendant made to Texas to negotiate a contract with the plaintiff was not enough for the state of Texas to assert general jurisdiction over the defendant. The defendant's purchases of helicopters from the plaintiff were not enough to enable the state of Texas to assert specific jurisdiction over the defendant when the cause of action did not arise from the purchase

¹⁴⁰ *Id.*

¹⁴¹ *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119, 1122 (W.D. Pa. 1997). See also *Hall*, 466 U.S. at 416.

¹⁴² *Zippo Mfg. Co.*, 952 F.Supp. at 1127.

¹⁴³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

¹⁴⁴ *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 317 (1945).

the contacts it lists with the state are unrelated to the plaintiff.¹⁴⁵ The second problem is that the *Zippo* court tries to make the connection and support its finding by citing to a line of cases which essentially say that a trademark violation occurs where the trademark is viewed.¹⁴⁶ The court states,

In the instant case, both a significant amount of the alleged infringement and dilution, and resulting injury have occurred in Pennsylvania. The object of Dot Com's contracts with Pennsylvania residents is the transmission of the messages that Plaintiff claims dilute and infringe upon its trademark. When these messages are transmitted into Pennsylvania and viewed by Pennsylvania residents on their computers, there can be no question that the alleged infringement and dilution occur in Pennsylvania. Moreover, since Manufacturing is a Pennsylvania corporation, a substantial amount of the injury from the alleged wrongdoing is likely to occur in Pennsylvania. Thus, we conclude that the cause of action arises out of Dot Com's forum-related activities . . .¹⁴⁷

It seems as though the *Zippo* court is using the mere viewing of the website in Pennsylvania to establish the requirement that the lawsuit must arise out of the contacts that the defendant has with the forum state.¹⁴⁸ Yet the court hastens to assert that this is not an Internet advertising case, and cites to the many contracts that Zippo Dot Com has with the forum state

¹⁴⁵ See *Helicopteros Nacionales De Colom. v. Hall*, 466 U.S. 408, 416 (1984). In this Supreme Court case even contacts between the parties which were not related to the dispute did not suffice for specific personal jurisdiction.

¹⁴⁶ *Zippo Mfg. Co.*, 952 F.3d at 1127.

¹⁴⁷ *Id.*

¹⁴⁸ It is possible that the *Zippo* court is confusing personal jurisdiction with subject matter jurisdiction. Subject matter jurisdiction over trademark infringement cases is very broad. The Lanham Act (on trademark infringement) provides district courts subject matter jurisdiction over any dispute where there is an allegation that a defendant used a trademarked name "in commerce." 15 U.S.C. § 1114(1)(a) (1998). Courts in Internet jurisdiction cases have held that defendant's use of a trademarked name of the Internet satisfies the "in commerce" requirement for subject matter jurisdiction. See *Intermatic Inc. v. Toeppen*, 947 F. Supp. 1227, 1239 (N.D. Ill. 1996).

to show that this is a “doing business over the Internet”¹⁴⁹ case. The court notes that it had held in the past that mere advertising was insufficient to establish personal jurisdiction. If advertising is not enough to establish minimum contacts, the first prong of the test, it is not clear how advertising can be enough to establish that a lawsuit arose out of the minimum contacts with the state, the second prong of the test. Stated another way, using the *Zippo* court’s logic, a non-resident could be sued in the state of Pennsylvania based on a magazine advertisement, because Pennsylvania residents saw it, which the *Zippo* court states it has held unlawful in the past. Although the *Zippo* court would probably refute this criticism by referring to the other contacts that the defendant in this case had with Pennsylvania, its argument would be circular because it uses the viewing of the website as the glue which connects the lawsuit to the contacts.¹⁵⁰

Burden on Nonresident Defendant

The court must not only analyze the contacts between the defendant and the forum state, but it must also consider the travel burdens on the non-resident defendant from having to defend the lawsuit in a distant forum. The Supreme Court in *Burger King* said the test for determining whether the exercise of jurisdiction is reasonable is, “the relative burdens on the plaintiff and defendant of litigating this suit in this or another forum, the forum state’s interest in adjudicating the dispute, and the interstate judicial system’s interest in efficient

¹⁴⁹ *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119, 1125 (W.D. Pa. 1997).

¹⁵⁰ See Sheehan, *supra* note 33, at 425. Sheehan criticizes the *Zippo* decision by stating, “What the *Zippo* court is really saying is that the only way for a defendant to avoid jurisdiction anywhere in the networked world is not to do business on the Internet at all.” *Id.*

resolution of controversies.”¹⁵¹ In the *Zippo* case the plaintiff was located in the state of Pennsylvania, and the defendant was located in the state of California. It was almost certainly burdensome for the California business to transport itself to Pennsylvania for the duration of a lawsuit, yet the *Zippo* court gave short shrift to these burdens on the defendant, finding that,

There can be no question that Pennsylvania has a strong interest in adjudicating disputes involving the alleged infringement of trademarks owned by resident corporations. We must also give due regard to the Plaintiff's choice to seek relief in Pennsylvania. These concerns outweigh the burden created by forcing the Defendant to defend the suit in Pennsylvania, especially when Dot Com consciously chose to conduct business in Pennsylvania, pursuing profits from the actions that are now in question.¹⁵²

The *Inset* court addressed the burdens on the defendant, too.¹⁵³ It asserted was that it was not really burdensome to subject the Massachusetts defendant to suit in Connecticut because the jurisdictions were only two hours away from each other by automobile.¹⁵⁴ Perhaps this lessened geographical burden is why the court had such an expansive view of minimum contacts. Downplaying the burden on the defendant is yet another aspect of the Due Process clause that is being watered down by courts in Internet cases. Such expansive views of minimum contacts may discourage Internet businesses and individuals from interacting with entities located in other states.

¹⁵¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

¹⁵² *Zippo Mfg. Co.*, 952 F.Supp. at 1127.

¹⁵³ *Inset Sys. Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D.Conn.1996).

¹⁵⁴ *Id.*

Improper and Insufficient Use of The *Calder* “Effects” Test

Courts may be able to avoid stretching to find minimum contacts by using a more traditional jurisdiction test in Internet cases: the *Calder* “effects” test. At least if courts use this test Internet defendants may regain some certainty about where they may be sued. They may know, for example, that their intentionally bad behavior toward a resident of another state could result in them being brought into court in that state. Of course, this presupposes that the Internet defendant knows which state the object of their malfeasance was located in. Greater use of such a test may prevent those “innocent” Internet defendants who aren’t intentionally trying to injure anyone from having to experience legal uncertainty. Courts sometimes find specific jurisdiction over a non-resident Internet defendant based on this test, as demonstrated by the cases discussed below. However, often courts refrain from using the *Calder* “effects” test in Internet cases, even when the defendant has allegedly committed an intentional tort such as defamation. Sometimes courts also find that trademark violation warrants the *Calder* “effects” test, even when there is no evidence that the violation is intentional.

One case where the California District court did assert personal jurisdiction over nonresident defendants using the *Calder* “effects” test was *California Software Inc. v. Reliability Research, Inc.*¹⁵⁵ The *California Software* court found specific jurisdiction in California over Nevada defendants who allegedly made false statements about the plaintiff over the Internet, among other places. The California district court stated,

¹⁵⁵ Cal. Software Inc. v. Reliability Research, Inc., 631 F. Supp. 1356 (C.D. Cal. 1986).

A defendant who purposefully directs his actions at a resident of the forum has “fair warning” that he may have to litigate there. By contrast, random, isolated or fortuitous contacts or the effects of undirected negligence do not justify the assertion of limited jurisdiction . . . Because defendants intentionally influenced third parties to injure the California plaintiffs, defendants should have foreseen answering for the veracity of their statements and the propriety of their conduct in California.¹⁵⁶

On the other hand, some courts in Internet defamation cases do not use the “effects” test, like the D.C. Federal District Court in the defamation case of *Blumenthal v. Drudge*.¹⁵⁷ Instead, the court found that the California defendant had minimum contacts with the District of Columbia because the defendant’s interactive website established communication between D.C. residents and the defendant.¹⁵⁸

Some courts use the “effects” test, but find that the effects aren’t directed to the plaintiff’s home state, but rather to cyberspace. This is how the Federal District Court (E.D. Pa) decided in *Barrett v. Catacombs Press*.¹⁵⁹ In *Barrett*, a Pennsylvania psychiatrist sued a woman who made remarks about his professionalism on the Internet because of his views on water fluoridation, which he publicized on his website. The plaintiff was a consumer health advocate. Because the plaintiff’s allegedly defamatory speech was related to the assertions the defendant made on his website, the court found that the effects of the intentional tort of

¹⁵⁶ *Id.* at 1361-62.

¹⁵⁷ *Blumenthal v. Drudge*, 992 F.Supp. 44, 48 (D.D.C. 1998). The plaintiffs in this case alleged that the defendant, a gossip columnist, had published defamatory material in his column about them over the Internet in *The Drudge Report*. The defendant e-mailed his publication directly to his subscribers and published it on his website.

¹⁵⁸ *Id.* at 57.

¹⁵⁹ *Barrett v. Catacombs Press*, 44 F.Supp.2d 717 (E.D. Pa. 1999).

defamation were not felt in the plaintiff's home state of Pennsylvania, but in cyberspace. The court held that because the defendant had not caused the plaintiff harm in the state of Pennsylvania, the Pennsylvania courts could not exercise jurisdiction.¹⁶⁰

Although the *Barrett* court didn't find defamation in the defendant's home state, it did at least indicate that defamation was the type of intentional conduct that could trigger use of the *Calder* "effects" test.¹⁶¹ Courts examine not only where the conduct was directed, but also whether the plaintiff has made an allegation that the defendant has exhibited intentionally bad behavior, usually involving an intentional tort.¹⁶² The question arises in Internet trademark violation cases¹⁶³ whether alleged trademark infringement is the sort of intentional act to which courts would apply the *Calder* "effects" test. The answer seems to be that it depends on how intentional the trademark violation. The more intentional the conduct, the more likely it is that the court will assert jurisdiction over a nonresident defendant. defendant's bad conduct can create jurisdiction over a non-resident defendant not only in a tort action, but also in a contract action.¹⁶⁴ The significance of intentionally bad conduct to due process is that that such conduct implies that the defendant can expect that he would be

¹⁶⁰ *Id.* at 731.

¹⁶¹ *Id.*

¹⁶² Nathenson, *supra* note 13, at 947.

¹⁶³ Internet trademark violation cases are those cases where the defendant has placed a word or mark on his website which the plaintiff claims he has a trademark on. *See e.g.* Maritz Inc. v. Cybergold, 947 F. Supp. 1328, 1331 (E.D. Mo. 1996).

¹⁶⁴ *See* Panavision Int'l. L.P. v. Toeppen, 938 F. Supp. 616, 620-21 (C.D. Cal 1996), where the court says, "in cases arising from contract disputes, merely contracting with a resident of the forum state is insufficient to confer specific jurisdiction." *Id.*

called into court in the forum of his adversary, so it is reasonably foreseeable to him and therefore doesn't violate due process.¹⁶⁵

Some courts find that trademark infringement is tortious conduct, but don't apply the effects test, perhaps because the defendant's conduct doesn't appear intentional enough. The U.S. Federal District Court (E.D. Mo.) in *Maritz Inc. v. Cybergold*¹⁶⁶ court found that trademark infringement was an intentional tort warranting application of the Missouri, but decided that using the "effects" test was not enough to satisfy due process requirements.¹⁶⁷ The plaintiff brought the action under the Lanham Act, §15 U.S.C. 1125(a), seeking to enjoin the plaintiff from alleged trademark infringement for the use of the term "Cybergold." The court first looked at whether the exercise of jurisdiction was permissible under Missouri's long-arm jurisdiction statute, and then whether the exercise of jurisdiction was consistent with due process. The state long-arm statute provided that Missouri courts could exercise jurisdiction to the extent permissible under the Due Process clause. The Missouri statute allowed personal jurisdiction over any individual or corporation for a cause of action arising

¹⁶⁵ See *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).

¹⁶⁶ *Maritz Inc. v. Cybergold*, 947 F. Supp. 1328 (E.D. Mo. 1996).

¹⁶⁷ *Id.* at 1331. See also Brian K. Epps, *Recent Developments: Maritz, Inc. v. Cybergold, Inc.: The Expansion of Personal Jurisdiction in the Modern Age of Internet Advertising*, 32 GA. L. REV. 237, 242-244 (Fall, 1997). Mr. Epps gives a more succinct rendition of the facts in *Maritz* than the court does. According to Mr. Epps, the plaintiff in *Cybergold* was a Missouri resident who claimed that the defendant was infringing his trademark by operating a website with the name www.cybergold.com. The server on which the website was located was in California. A server is a host computer which sells computer space to clients, who then connect to this space via the Internet (see GRALLA, *supra* note 22, at 175). Clients can use this computer space for websites, which is what cybergold.com was doing. *Cybergold.com* was a website which provided information to Internet visitors about an upcoming free e-mail service that the website would offer. The operator of the website planned to earn income from selling advertising on the website. The plaintiff, *Maritz, Inc.*, a Missouri corporation, began a website with the name, "www.goldmail.com," which was operational, and offered basically the same service as www.cybergold.com planned to offer. Although the court didn't specify that the case lacked the sort of bad

from either the transaction of business in the state or commission of a tortious act within the state. The court had some difficulty deciding whether operation of an Internet site by the defendant (www.cybergold.com) met the “transaction of business” test. However, it declined to decide this issue because it determined that it could exercise jurisdiction because trademark infringement was a tortious act. The court did go on to examine whether the defendant had additional contacts with the state. The *Maritz* court found that such an examination was necessary to establish that jurisdiction over Cybergold was consistent with due process. It didn’t use the “effects” test to establish the contacts; rather it looked at the quality and quantity of contacts that the defendant had with the state of Missouri.

Cybergold’s website provided information to viewers about an upcoming free-e-mail service that Cybergold would offer, and invited viewers to e-mail the company to register for the service. The court established the quality of contacts that Cybergold’s contacts by stating that Cybergold’s intent in posting this website was to reach all internet users, which the court found an active effort rather than a passive one, and one favoring the exercise of personal jurisdiction. The court then looked at the quantity of contacts that Cybergold had with the state of Missouri, and found that Cybergold had transmitted information to a person residing in the state of Missouri approximately 131 times. The court found that this indicated that Cybergold had purposefully availed itself of the privilege of doing business in the state of Missouri, and therefore jurisdiction over the non-resident defendant was proper.¹⁶⁸

Although this thesis discusses the *Maritz* case as an example of a tort case where the court

intent necessary to apply the “effects” test, it appears from the facts of *Maritz* that this is so. *Maritz Inc.*, 947 F.Supp at 1331.

¹⁶⁸ *Maritz Inc.* 947 F. Supp. at 1331. For an excellent criticism of the *Maritz* decision, see Epps, *supra*. note 138, at 270-271. Mr. Epps compares the Internet advertising that Cybergold was doing to magazine advertising, which many cases have held does not create jurisdiction in an out-of-state court just because a resident of that state happens to view the advertisement.

didn't base jurisdiction on the *Calder* "effects" test, it is also another example of a specific jurisdiction cyber case where the court listed improper contacts which were improperly related to the lawsuit. It is similar to *Zippo* in this regard.

In *Cybersell Inc. v. Cybersell Inc.*,¹⁶⁹ another case of alleged trademark violation, the Ninth Circuit also refrained from using "effects" test, and refrained from asserting jurisdiction over a nonresident defendant. The plaintiff, Cybersell, Inc., was an Arizona business which advertised for commercial services over the Internet. It held a trademark for the name "Cybersell." It sued a Florida business, also Cybersell, Inc., which sold website construction services. The Florida Cybersell, Inc operated a website using the term "Cybersell" as part of its web address (www.cybersell.com). The Cybersell website included an invitation to viewers to E-mail the business owners to find out more information about the business. In this case the Ninth Circuit seems to have examined Cybersell's conduct in Florida before determining it did not merit application of the effects test. The defendant in *Cybersell* attempted to change the name of its Florida website once the Arizona plaintiffs notified it that they held the copyright for the name "Cybersell." Unfortunately, the defendant failed to completely remove all references to the copyrighted name on its website, which gave rise to the Arizona company's lawsuit against it. The court stated,

Cybersell AZ also invokes the "effects" test employed in *Calder v. Jones* . . . and *Core-Vent Corp. v. Nobel Industries* . . . with respect to intentional torts directed to the plaintiff, causing injury where the plaintiff lives. However, we don't see this as a *Calder* case. Because Shirley Jones was who she was (a famous entertainer who lived and worked in California) and was libeled by a story in the National Enquirer, which was published in Florida but had a nationwide circulation with a large audience in California, the Court could

¹⁶⁹ *Cybersell, Inc. v. Cybersell Inc.*, 130 F.3d 414 (9th Cir. 1997).

easily hold that California was the ‘focal point both of the story and of the harm suffered’ and so jurisdiction in California based on the “effects” of the defendants’ Florida conduct was proper. There is nothing comparable about Cybersell FL’s web page. Nor does the “effects” test apply with the same force to Cybersell AZ as it would to an individual, because a corporation “does not suffer harm in a particular geographic location in the same sense that an individual does. Cybersell FL’s web page simply was not aimed intentionally at Arizona knowing that harm was likely to be caused there to Cybersell AZ.”¹⁷⁰

Applying “minimum contacts” analysis, the court found that

[I]t would not comport with ‘traditional notions of fair play and substantial justice’ for Arizona to exercise personal jurisdiction over an allegedly infringing Florida web site advertiser who has no contacts with Arizona other than maintaining a home page that is accessible to Arizonans, and everyone else, over the Internet.¹⁷¹

The Ninth Circuit first applied the Arizona long-arm statute, which provided that an Arizona court could exercise personal jurisdiction to the extent permitted by the U.S. Constitution.

The court then used a three-part test to determine whether Constitutional due process requirements were satisfied. The test is very similar to that formulated by the Supreme Court in *Burger King*. According to the Ninth Circuit, in order for a court to assert jurisdiction over a non-resident defendant,

(1) The nonresident defendant must do some act or consummate some transaction with the forum state or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections [;] (2) [t]he claim must be one which arises out of or results from the defendant’s forum-related activities[;and](3)[e]xercise of jurisdiction must be reasonable.¹⁷²

¹⁷⁰ *Id.* at 420.

¹⁷¹ *Id.*

The court first defined “purposeful availment” as requiring some deliberate action by the defendant within the forum state or some creation by the defendant of a continuing obligation to forum residents.¹⁷³ The court examined other Internet cases to see how those courts had handled the issue of “purposeful availment,” using the spectrum analysis employed by the court in *Zippo Manufacturing*. The *Cybersell* court decided that its case fell on the passive end of the spectrum, since the Florida website was not a very interactive website (it was mostly just for posting information). Therefore, it held that the defendant’s contacts with the state of Arizona were insufficient to allow Arizona to exercise jurisdiction over it. The court stated,

Here, Cybersell FL has conducted no commercial activity over the Internet in Arizona. All that it did was post an essentially passive home page on the web, using the name “CyberSell,” which Cybersell AZ was in the process of registering as a federal service mark. While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents.¹⁷⁴

Similarly to the defendant Cybergold in the *Maritz* decision, the *Cybersell* defendant included in its website an invitation to E-mail the proprietors. However, while this website invitation helped the Missouri District court in *Maritz* find minimum contacts, it doesn’t appear to have made the same impact on the Ninth Circuit in *Cybergold*. Even though both cases have substantially similar facts, the courts decide in opposite ways.

¹⁷² *Id.* at 416 (citing *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.1995)).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 420.

Overall, courts deciding matters of personal jurisdiction over nonresident Internet defendants do not yet have a unified approach, but instead use different tests.¹⁷⁵ This tends to be confusing. The one unifying theme in these cases has been the spectrum analysis from the Pennsylvania district court in *Zippo*.¹⁷⁶ Courts are still willing to use the *Calder* “effects” test to find personal jurisdiction based on the defendant’s conduct, but they don’t always use it, even in defamation cases.¹⁷⁷ Most courts don’t use the “effects” test in Internet trademark infringement cases that don’t involve intentional conduct.¹⁷⁸ Courts have found minimum contacts on the basis of contracts between the defendant and residents of the forum, even if the contacts weren’t between the parties and the lawsuit does not clearly spring out of those contracts.¹⁷⁹

When courts take such expansive views of minimum contacts and purposeful availment in Internet jurisdiction cases, legal predictability suffers. The Supreme Court guarantees nonresident defendants legal predictability in *World-Wide Volkswagen*.¹⁸⁰ When a

¹⁷⁵ See Lewis and Davis, *supra* note 12, at 212. These authors point out that one reason that courts come up with such varying decisions in cyberspace jurisdiction cases is that most of the courts are U.S. district courts, so their decisions don’t bind each other. However, the Ninth Circuit’s decision in *Cybersell* will of course bind the district courts in that circuit.

¹⁷⁶ See *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997).

¹⁷⁷ See *Blumenthal v. Drudge*, 992 F.Supp. 44, 48 (D.D.C. 1998).

¹⁷⁸ See *Maritz Inc. v. Cybergold*, 947 F. Supp. 1328, 1331 (E.D. Mo. 1996) (an example of an Internet trademark infringement case that doesn’t use the “effects” test to establish jurisdiction).

¹⁷⁹ See *Zippo*, 952 F.Supp. at 1126.

¹⁸⁰ *Worldwide Volkswagen Corp. et al. v. Woodson*, 444 U.S. 286, 297 (1980). As the Court stated in *World-Wide Volkswagen*, if the defendant has no clear notice that it is subject to suit in a particular forum, it would violate the Due Process clause for that forum to exercise personal jurisdiction over the defendant, because the defendant had no opportunity to: “[A]lleviate the risk of burdensome litigation there....the Due Process Clause, by ensuring the ‘orderly administration of the laws,’ gives a degree of predictability to the legal system that

person or corporation engages in E-commerce,¹⁸¹ or any sort of commerce, the Due Process clause requires that it be able to structure its conduct to comply with the laws of some particular jurisdiction. It would be very burdensome indeed to require such a party to structure its content and conduct to comply with the laws of *every* jurisdiction in the country (and, taken to the logical extreme, the world). The court in the *Inset* case would have the Internet defendant do just that, however, because according to the court's logic, any state where the defendant's website is viewed can take jurisdiction over the operator of that website.¹⁸² Exercising jurisdiction in some of these cases does not comport with the requirements of "fair play and substantial justice."¹⁸³ The theory that somehow an Internet actor's efforts were purposefully directed towards a particular state defies logic, really. After all, someone who wants to access a web page must put forth some effort on his or her end to access an Internet entity's Web page. A Web patron must access a computer and Internet service, and then actually log on¹⁸⁴ to the Internet. This series of actions by the patron means that he is purposefully obtaining information located elsewhere; the information is not being

allows potential defendants to structure their primary conduct with some minimum assurance that conduct which will and will not render them liable to suit." *Id.*

¹⁸¹ E-commerce, or electric commerce, is defined as "Doing business online, typically via the Web. It is also called "e-business," "e-tailing" and "I-commerce." Although in most cases e-commerce and e-business are synonymous, e-commerce implies that goods and services can be purchased online, whereas e-business might be used as more of an umbrella term for a total presence on the Web, which would naturally include the e-commerce (shopping) component." TechEncyclopedia, *at* <http://www.techweb.com/encyclopedia/defineterm?term=e-commerce> (last visited Mar. 24th, 2001).

¹⁸² *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D.Conn.1996).

¹⁸³ *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 316 (1945).

¹⁸⁴ Webopedia defines "Log-on" as, "To make a computer system or network recognize you so that you can begin a computer session. Most personal computers have no log-on procedure -- you just turn the machine on and begin working. For larger systems and networks, however, you usually need to enter a username and password before the computer system will allow you to execute programs," *at* http://webopedia.internet.com/TERM/l/log_on.html (last visited Mar. 25, 2001).

thrust at him by the Internet entity.¹⁸⁵ Therefore, an Internet defendant shouldn't necessarily be seen as purposefully directing its actions toward a particular person or jurisdiction, especially when they probably don't even know where the party with whom they are transacting is geographically located.

INTERNET DEFENDANTS IN FOREIGN COUNTRY COURTS

Courts still care very much where the parties are geographically located. Geography is still very important to courts, especially when they decide cases between parties from different countries. Worrying about jurisdiction within another state in the U.S. is difficult enough for Internet businesses, but they may actually be subject to jurisdiction anywhere in the world based on the corporation's Internet presence. The beauty of the Internet, is, after all, that a Web page is accessible anywhere in the world. The ease of transaction means more transactions, a different variety of transactions, and more disputes arising from those transactions. When disparate entities from different parts of the world come together, disputes should be expected. The probability of such disputes and their attendant jurisdictional battles requires that U.S. due process be analyzed in an international context to determine whether it protects nonresident defendants internationally. This thesis will therefore examine the analysis that U.S. courts use when a foreign corporation is sued in the U.S. It will also explore the analysis that foreign courts use to take jurisdiction over a U.S. corporation based on its Internet activities. The paper will first examine some Internet cases

¹⁸⁵ This argument was made by the court in *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 295, 299 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir.1997). *Bensusan* was a Internet trademark infringement case where the district court found no personal jurisdiction. The court found no intentional conduct where a Missouri club

in which U.S. courts assert jurisdiction over foreign corporations, and then it will discuss Internet cases in which foreign courts assume personal jurisdiction over U.S. corporations. The goal of this discussion is to broaden the analysis of due process by examining international Internet cases with due process issues. The paper will analyze whether due process in a U.S. court protects a foreign Internet defendant more or less than a U.S. nonresident Internet defendant. Finally, the paper will explore foreign Internet cases to demonstrate to the reader that foreign courts' analysis most often does not incorporate the U.S. concept of due process.

One familiar concept is incorporated when courts hear cases regarding action that takes place in another countries; the "effects" doctrine. Although it is not the *Calder* "effects" doctrine, it is similar. Courts both abroad and in the U.S. have used the international "effects" doctrine as a basis on which to assert jurisdiction over a foreign defendant.¹⁸⁶ This doctrine is that a court can exercise jurisdiction over an Internet operator because the "effects" of that website can be felt in the forum state.¹⁸⁷ This theory has been called the "territoriality" theory in international law – where a country seeks to control the

had the same name as a New York club (The Blue Note), the Missouri club put the name on their website but included a disclaimer stating that they were not affiliated with the New York club.

¹⁸⁶ See *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), where the court decided that the Sherman Act, a U.S. statute, was intended to control the conduct of those corporations outside U.S. borders that acted to control events within U.S. The court said it was settled law that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends." Other courts have criticized the test in this case for failing to take into account "important considerations of international comity, reciprocity and foreign policy . . ." *Timberlane Lumber Company et.al. v. Bank Of America*, 574 F.Supp. 1453, 1464 (D.N.Cal. 1983). The *Timberlane* court described the Ninth Circuit criteria for taking jurisdiction based on the "effects" doctrine as follows, "In evaluating whether the plaintiff has alleged a cause appropriately within the extraterritorial reach of the Sherman Act, we have balanced the impact of the Bank's conduct on U.S. commerce against the potential ramifications of asserting jurisdictions." *Id.*

¹⁸⁷ HENKIN ET. AL., *supra* note 6, §3.25, at 882.

action of those outside its territory because the effects of that action are felt within its territory.¹⁸⁸ Both the *Calder* “effects” and the international “effects” tests use the effects in the forum state of the non-resident defendant’s conduct to justify the exercise of jurisdiction over him. Unlike the *Calder* “effects test,” however, it isn’t clear that courts will limit their exercise of international “effects” jurisdiction to cases involving the allegation of some sort of intentional tort.

Personal Jurisdiction in U.S. Courts Over Foreign Internet Defendants

It appears that U.S. courts are content to use the *Calder* “effects” doctrine to assert jurisdiction over foreign country Internet defendants, rather than trying to use the international “effects” doctrine. U.S. courts do apply due process analysis to foreign defendants as well as U.S. defendants. In fact, the Supreme Court has stated that courts must apply Due Process even more carefully to foreign defendants.¹⁸⁹ As part of the due process analysis, a forum court may decide that the geographic distance between the defendant and

¹⁸⁸ *Id.*

¹⁸⁹ See *Asahi*, 480 U.S. at 115, where the Court states,

World-Wide Volkswagen also admonished courts to take into consideration the interests of the “several States,” in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court’s assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government’s interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. “Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.” *United States v. First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).” See also *Noonan v. Winston Co.*, 135 F.3d 85, 93 (1st Cir. 1998).

the forum court makes it unreasonable for the court to hear the dispute.¹⁹⁰ The most salient example of a U.S. court asserting jurisdiction over a foreign country defendant is the recent case of *Euromarket Designs v. Crate & Barrel Ltd.*¹⁹¹ The plaintiff in *Euromarket* was Crate & Barrel furniture company based in Illinois (Crate & Barrel) which sued an Irish company, Crate & Barrel Ltd. (Limited), for trademark infringement. Crate & Barrel had a website called “www.crateandbarrel.com” and Limited had a website called “www.crateandbarrel-ie.com.” Limited’s goods were priced in U.S. dollars, and U.S. residents could order furniture from the site, despite the defendant’s disclaimer on the site that goods could only be sold within the Irish Republic. The order form on Limited’s website was even set up to accommodate U.S. addresses. Limited sold furniture to an Illinois resident, who just happened to order the furniture at the instigation of the plaintiff’s law firm. The court found that Limited had purchased goods at trade shows in Illinois. Based on these visits, and on its finding that Limited had deliberately and intentionally violated Crate & Barrel’s trademark on Limited’s website, the Illinois district court found it had personal jurisdiction over the Irish defendant. As the court stated, “Through both its Internet and non-Internet activities, Limited has deliberately developed and maintained not only minimum, but significant, contacts with this forum. Therefore, personal jurisdiction over Limited in Illinois is proper.”¹⁹² The *Euromarket* court also analyzed Limited’s Internet contacts with Illinois by using the *Zippo* court’s spectrum analysis, finding that this case fell into the category of “interactive websites which allow a defendant to ‘do business’ and ‘enter into contracts’ with

¹⁹⁰ See *Helicopteros Nacionales de Colombia*, 466 U.S. at 416, where the Supreme Court did not allow Texas to assert general jurisdiction over a Columbian helicopter transport company despite the many purchases of helicopter parts in Texas that the company had made.

¹⁹¹ *Euromarket Designs Inc.*, 96 F.Supp. 2d at 824 (N.D. Ill., 2000).

residents of a foreign jurisdiction.”¹⁹³ The court correctly combines the *Calder* “effects” test with the *Zippo* “spectrum test” to find that its assertion of jurisdiction over the Irish defendant was reasonable. The court considered the burden on the Irish defendant of having to defend the case in a foreign country. The court concluded that the defendant’s inconvenience was not so great as to violate due process, since the defendant routinely visited Illinois on business trips, and modern technology eased travel burdens.¹⁹⁴ This case is an example of how courts will only use the *Calder* “effects” test when the trademark violation truly appears to be intentional. The court found that Crate & Barrel was a nationally known furniture manufacturer which had been in business for thirty-five years, while Limited had been in business only six years. Limited’s website appeared to target customers in the U.S. because its address form was set up to accommodate U.S. addresses, with an entry window for city, state and zip code. These facts all support the allegation that Limited was trying to profit from an intentional infringement of Crate & Barrel’s trademark.

A U.S. case with a foreign Internet defendant where the court didn’t find jurisdiction is *Agar v. Multi-fluid*.¹⁹⁵ The plaintiff in *Agar* claimed that the Norwegian defendants had

¹⁹² *Id.* at 839.

¹⁹³ *Id.* at 838.

¹⁹⁴ Compare *Euromarket Designs Inc.*, 96 F.Supp. 2d at 824 (N.D. Ill., 2000) with *Asahi Metal Indust. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 114 (1987). In *Asahi* the Supreme Court concluded that the great distance between the Japanese defendant’s corporate headquarters in Japan and California made it unreasonable for the defendant to appear in the California court. The Supreme Court also saw as particularly burdensome, the onus of “defending oneself in a foreign legal system.”*Id.* However, in *Asahi*, almost all of the pertinent events took place in Asia, rather than in California, where the plaintiff was located. Also, the original plaintiff in *Asahi*, who had been located in California, had settled the case with another defendant, which diminished California’s interest in the case. In *Asahi* the plaintiff alleged no intentionally wrong conduct, as did the plaintiff in *Euromarket*.

¹⁹⁵ *Agar v. Multi-Fluid*, 1997 U.S. Dist. LEXIS 17121, *6 (S.D. Tex. 1997). *Agar*, a Texas corporation, sued Hitec ASA and Multi-fluid International, two Norwegian companies, for patent infringement. Hitec was the

infringed on a patent in Texas by posting a statement on the defendants' webpage which said, "For Watercut meters, Multiphase Meter and Subsea Multiphase Meter, please contact Multi-fluid on +47 51 800 151 or +1 303 279 0670."¹⁹⁶ The plaintiffs asserted that the meters listed on the defendant's website violated the plaintiff's patents. The defendants asserted that the exercise of jurisdiction by the Texas court would violate due process because they had no offices, employees or property in the state of Texas. The plaintiff contended that the court could assert jurisdiction over the Norwegian defendants because the Norwegians were doing business in Texas via their website. The Texas Federal District Court disagreed that the Norwegian's website established sufficient minimum contacts with the state of Texas for the Texas court to exercise jurisdiction over the Norwegians. The district court, using the *Zippo* court's spectrum analysis,¹⁹⁷ stated,

Hitec's website is largely passive. With the exception of two "buttons" on one of the seven Hitec web pages, which appear to permit "feedback" and "registration," the site is entirely informational. Products cannot be purchased, nor contractual relationships established, through the site. . . Information provided by a passive website, whether it be advertising or a firm offer to sell, does not seek out the customer but merely resides in "cyberspace" waiting to be visited on the initiative of the Internet explorer. A site's sponsor cannot purposefully direct the information to any particular jurisdiction merely through maintenance of a passive Web site. The site, if not restricted by subscription or other restrictions requiring password access, is available to all comers and cannot be practically blocked from access by the citizens of particular locations.¹⁹⁸

parent company for Multi-fluid International. The principle place of business for the two Norwegian companies was Norway. Multi-fluid, Inc. was another defendant, and its principal place of business was in Colorado. Both Agar and Multi-fluid Inc. sold watercut and multiphase meters for use in the oil industry. Agar contended that Multi-fluid International and Hitec ASA also infringed on Agar's patent through their relationship and marketing arrangement with Multi-fluid Inc.

¹⁹⁶ *Id.*

¹⁹⁷ See *Zippo Manuf. Co. v. Zippo Dot Com*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997).

¹⁹⁸ *Agar*, 1997 U.S. Dist. LEXIS 17121 at 8-9.

Because the *Agar* court found that the Norwegians' website was passive in nature, it found that the defendants had not purposefully availed themselves of the forum, so the Due Process clause did not permit it to take personal jurisdiction over the Norwegians.¹⁹⁹

The *Agar* court didn't find the defendants malfeasant in any way, unlike the *Euromarket* court, which found that the Irish defendant had intentionally infringed the plaintiff's trademark. However, had the facts been otherwise, and the court found malfeasance and determined that the defendant's website was interactive, then it could have approved personal jurisdiction over the Norwegian defendant using the *Calder* "effects" test and the *Zippo* spectrum analysis.²⁰⁰

As the *Euromarket* and *Agar* courts demonstrate, U.S. courts do not hesitate to assert jurisdiction over foreign country Internet companies. U.S. courts will, however, usually apply U.S. due process standards to defendants from foreign countries. In fact the Supreme Court has stated that Due Process must be even more carefully applied to foreign defendants.²⁰¹ As

¹⁹⁹ *Id.* The Texas Federal District Court also declined to assert personal jurisdiction over the Norwegian defendants on the basis of the relationship between the Colorado defendant corporation and the Norwegian defendant corporations. The Texas court stated that the 5th Circuit did not impute contacts of the subsidiary corporation to its parent when the two acted as distinct corporations, which was the case here. *See also* Committee Report: Subcommittee No. 753 -- Special Committee On Multimedia -- Judith M. Saffer, Chair Barry D. Weiss, Vice-Chair, 1998 ABA Sec. Intellectual Property Law Rep. 467 (1998). The committee, discussing cases which held that a state had personal jurisdiction based on a nonresident defendant's Internet presence, stated, "The logic of these decisions suggests that a defendant based in a foreign country, like a defendant based in another state, may be forced to defend a lawsuit in a foreign jurisdiction based on web activity. The few decisions on point, however, evidence a reluctance to reflexively extend the jurisdictional largess around the globe." The committee cited only *Agar* as a decision on point.

²⁰⁰ *Zippo Mfg. Co.*, 952 F. Supp. at 1124.

²⁰¹ *See Asahi Metal Indust. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 115 (1987). In this case the Court states,

part of the due process analysis, a court may decide that the geographic distance between the defendant and the forum court makes it unreasonable for the forum state to hear the dispute

U.S. Internet Defendants in Foreign Country Courts

If a U.S. Internet defendant gets tried in a foreign court, it is unlikely that the foreign court will apply to it the U.S. notion of due process. As one scholar opined, “[M]any [foreign] states have habitually exercised adjudicatory authority over persons or things outside of their borders in the absence of some contact that would be considered sufficient under due process limitations developed in the United States.”²⁰² The Restatement of the Foreign Relations Laws of the United States, section 421, states general rules with regard to whether a country’s courts can take jurisdiction over a foreign defendant. It states:

§ 421. Jurisdiction to Adjudicate

(1) A state may, through its courts or administrative tribunals, exercise jurisdiction to adjudicate with respect to a person or thing, if the relationship of the person or thing to the state is such as to make the exercise of such jurisdiction reasonable.

World-Wide Volkswagen also admonished courts to take into consideration the interests of the “several States,” in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court’s assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government’s interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.

Id. See also *Noonan v. Winston Co.*, 135 F.3d 85, 93 (1st Cir. 1998).

²⁰² HENKIN ET AL., *supra* note 6, at 882.

(2) A state's exercise of jurisdiction to adjudicate with respect to a person or thing is generally reasonable if, at the time jurisdiction is asserted, any one of the following applies: . . .

(j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct or foreseeable effect within the state, which created liability, but only in respect of such activity;.

(k) the thing that is the subject of adjudication is owned, possessed, or sued in the state, but only in respect of that thing or a claim reasonably connected with it.

(3) A defense of lack of jurisdiction is generally waived by any appearance by or on behalf of a person or thing (whether as plaintiff, defendant or third party), other than for the purposes of challenging jurisdiction.²⁰³

The language in §2j, above, is the international "effects" doctrine discussed earlier in this thesis. Like the U.S. rule on specific jurisdiction, §2j provides that courts may assume jurisdiction over a non-U.S. defendant based on the effects of the defendant's action in a foreign country. Also like specific jurisdiction, however, international "effects" jurisdiction is narrow: it is only with regard to that particular action causing the effects.

At least one foreign court has shown it is willing to assert international "effects" jurisdiction over a U.S. defendant in an Internet case. A French court decided a case against the U.S. company Yahoo, Inc., and its French subsidiary Yahoo France in the case of *Licra*

²⁰³ *Id.*, citing RESTATEMENT OF THE FOREIGN RELATION LAWS OF THE UNITED STATES § 402 (Revised, 1986). Other bases on which to assert jurisdiction include: the person or thing is present in the territory of the state other than transitorily; the person, if a natural person, is domiciled in the territory of the state; the person, if a natural person, is resident in the territory of the state; the person, if a natural person, is a national of the state; the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state or a subdivision of the state; a ship or aircraft (or other vehicle) to which the adjudication relates is registered pursuant to the laws of the state; the person, whether natural or juridical, has consented to the exercise of jurisdiction; the person, whether natural or juridical, regularly carries on business in the state; the person, whether natural or juridical, had carried on activity in the state which created liability, but only in respect of such activity. *Id.*

et UEJF v. Yahoo Inc. and Yahoo France.²⁰⁴ The French court stated, “Whereas the harm is suffered in France, our jurisdiction is therefore competent over this matter pursuant to article 46 of the New Code of Civil Procedure.”²⁰⁵ The plaintiff in this case was The International League against Racism and Anti-Semitism (LICRA) and the Union of French Jewish students (UEJF). LICRA and UEJF brought the action in the Paris Superior Court against both Yahoo France and its parent company Yahoo, Inc. The plaintiffs initiated the action because Yahoo Inc.’s online auction sold Nazi memorabilia, and the French penal code prohibited “banalizing” Naziism, or making it appear less harmful than it actually was. LICRA wanted the court to issue an injunction against Yahoo, Inc. to prevent the exhibition and sale of the Nazi items on its website. Yahoo Inc. argued in pertinent part that the French court did not have jurisdiction over the matter, that the 1st Amendment of the U.S. Constitution prevented them from removing the items from the auction, and that there was no technically feasible way for Yahoo, Inc. to block those items from French viewers. The judge found that by permitting French citizens to view the Nazi items on the auction, Yahoo Inc. “committed a wrong on the territory of France.”²⁰⁶ It also found that Yahoo could identify the geographic origin of Internet visitors to its website, and should therefore be able to block French visitors from accessing the auction site. The court stated, “But whereas Yahoo! Inc. is in a position to identify the geographical origin of the site which is coming to

²⁰⁴ *LICRA et UEJF v. Yahoo France*, Superior Court of Paris, Order in Summary Proceedings, May 22nd, 2000, unofficial English translation by Daniel Lapres, at <http://www.gyoza.com/lapres/html/yahen.html>.

²⁰⁵ *Id.* at 10.

²⁰⁶ *Id.* at 8.

visit, based on the IP address of the caller, which should therefore enable it to prohibit surfers from France, by whatever means are appropriate.”²⁰⁷

The court continued by saying that if Yahoo couldn’t determine the geographic location of an Internet viewer based upon the Internet address, it should refuse to give the visitor access to its site until the visitor revealed his or her geographic location.²⁰⁸ Additionally, the French judge ordered Yahoo, Inc. to examine its website to ensure that the none of its other material could “infringe upon the internal public order of France.”²⁰⁹ The judge gave Yahoo, Inc. two months to devise a technical means of blocking French visitors from its auction site. The court ordered Yahoo France to install a banner on its website directed to French citizens intending to use Yahoo France’s link to Yahoo.com. The banner was to warn French citizens that if they tried to visit the sites prohibited by French law that Yahoo France would sever their Internet connection. The court awarded 10,000 francs to each plaintiff, and ordered the defendants to pay the costs of the court action.²¹⁰

After two months, Yahoo, Inc. told the court that it could not comply with the original order because it was technically impossible to block French viewers from its website.²¹¹

²⁰⁷ *Id.* at 9.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Richard Salis, *A Look at How U.S. Based Yahoo Was Condemned by French Law*, at <http://www.juriscom.net/txt/jurisfr/cti/yauctions.htm> (last modified Nov. 10, 2000).

The judge appointed a panel of experts to advise whether it was technically possible to block Internet visitors based on their geographic location. The panel was comprised of one European, one Frenchman, and one American. The experts concluded that it was not possible to completely block computer transmissions based on geography, but that a geographical blocking system could screen out about 80% of persons visiting from a particular geographic area.²¹² The judge then issued an order giving Yahoo, Inc. and Yahoo France three months to implement the technology necessary to comply with his original order or Yahoo Inc. would be fined \$100,000 francs (\$13,000) for every day that they were not in compliance. Yahoo, Inc. responded by filing an action in the U.S. Federal District Court in San Jose, California, seeking a declaratory judgment that Yahoo Inc. did not have to pay the fines. Yahoo Inc.'s basis for the action was that the French Government had no jurisdiction over the California-based company.²¹³

Shortly after filing the declaratory judgment action, Yahoo, Inc. pulled the disputed items of Nazi paraphernalia from its auction site.²¹⁴ Yahoo, Inc. probably took this action because it was going to take the U.S. Federal District Court several months to issue an order in the case, beyond the time established by the French court for the onset of fines. Meanwhile, Yahoo, Inc. could not shield itself from the French fines because it didn't think it

²¹² *Id.*

²¹³ Peter Sayer, *French "Unimpressed" by Yahoo Appeal*, INFOWORLD DAILY NEWS, Dec. 22, 2000, LEXIS, Nexis Library, INFOWORLD DAILY File.

²¹⁴ Verena Von Derschau, *Yahoo Bans Auctions of Hate Items; Move Wins Praise from French Groups*, THE RECORD, January 4, 2001, at A12. According to this article Nazi paraphernalia joined a list of other banned items that also includes cigarettes, live animals and used underwear.

was possible to block French viewers from accessing its sites.²¹⁵ Although the Federal District Court could very well have ruled that the French court had no jurisdiction to adjudicate the decision with respect to the U.S.-based Yahoo Inc., in the end the French court had the upper hand because it could enforce its judgment against Yahoo Inc.'s French subsidiary, Yahoo France. The French court could effectively end Yahoo's ability to do business in France if Yahoo Inc. failed to comply with the court's order, and it appears that Yahoo Inc. knew this. The French court arguably lacked personal jurisdiction over Yahoo, Inc. based on its theory that the harm had occurred in France. However, it had some form of jurisdiction, jurisdiction *in rem*, or over the thing.²¹⁶ French courts could seize the property present in France to satisfy the French judgment against Yahoo, Inc., if need be. Because Yahoo wanted to prevent this, it took the easiest course of action by pulling the Nazi items off its auction site. If the French court had insisted that it shield French viewers from all references to Nazi memorabilia on the Internet, then Yahoo Inc. would not have been able to comply and would likely have had to just stop doing business in France.²¹⁷

²¹⁵ *Yahoo! Asks U.S. Court to Intervene in French Dispute on Auctions*, AGENCE FRANCE PRESSE, December 21, 2000, LEXIS, Nexis Library, AGENCE FRANCE PRESSE File.

²¹⁶ See *Pennoyer v. Neff*, 95 U.S. 714, 731(1828). As a review, the Supreme Court in *Pennoyer* distinguishes between jurisdiction *in rem*, which a state court could exercise over a nonresident defendant's property if it had property in the state, and jurisdiction *in personam*, which the court could exercise over the defendant's person, but only if the defendant was a resident of that state. Subsequently, the Court in *International Shoe Corp.* expanded *in personam* jurisdiction to allow state courts to exercise jurisdiction over a nonresident defendant if it had sufficient contacts with the state. See *Int'l. Shoe Corp. v. State of Wash. et al.*, 326 U.S. 310, 316 (1945).

²¹⁷ See also *F.R.G v. Somm* (Munich Amtsgericht 1998[Local Court]), File No. 8340 Ds 465 Js 173158/95. Translation and commentary by Christopher Kuner., at <http://www.kuner.com/data/reg/somm.html> (last modified September 25, 2000). Although this case didn't involve a foreign court's exercise of jurisdiction over a U.S. Internet defendant, here the German court was trying to influence the U.S. parent company (Compuserve U.S.A.) by exercising criminal jurisdiction over Felix Somm, the head of its German subsidiary (Compuserve Germany). The German court convicted Felix Somm of distributing illegal child pornography for failing to block this pornography from arriving at the computers of German viewers. The pornography arrived at the German computers from the Internet over computer connections supplied by both Compuserve Germany and Compuserve U.S.A. The German court gave Somm a two-year suspended sentence. On the bright side, the case was overturned on appeal. See *Roundup, In Test Case, German Court Acquits Ex-Compuserve Executive of*

An Internet actor operating within the borders of the U.S must realize that a foreign country may be able to exercise jurisdiction over it based on effects from the Internet business within the foreign country. If the business has a subsidiary in the foreign country, the foreign country's court has greater enforcement power because it can always enforce its judgment against the foreign subsidiary, as France could in the *Yahoo* case.²¹⁸ What is troubling, though, is that when foreign courts do exercise jurisdiction over Internet companies, they may tell the companies to shield their country from certain effects of the company's operations.²¹⁹ Presently geographic filtering devices are difficult to use on the

Porn Charges, DEUTSCHE PRESSE-AGENTUR, Nov. 17, 1999, LEXIS, Nexis Library, DEUTSCHE PRESSE-AGENTUR File. The *Somm* case was notable in that the German court was trying to control the Internet environment in order to prevent it from impinging on German law. In this regard it is similar to the *LICRA* case.

²¹⁸See also Robin Bynoe, *Illegal Surfing*, CHEMIST & DRUGGIST, July 17, 1999, LEXIS, Nexis Library, Major World Publications File. The author discusses whether the English courts would prosecute a U.S. Internet supplier of Viagra. He notes it is illegal to advertise Viagra to the public in England. He concludes that English courts probably would not try to assert jurisdiction, for the English courts, "dislike making orders where there is absolutely no chance of anyone taking notice of them." *Id.* The author caveats this statement with the observation that if the U.S. Internet drug companies become large enough, and have assets in Europe, the chances of English courts asserting jurisdiction increase.

²¹⁹See also *Playboy Enter., Inc. v. Chuckleberry Publ'g, Inc.*, 939 F.Supp. 1032, 1044-45 (S.D.N.Y. 1996), for an example of a U.S. court telling a foreign defendant to shield U.S. viewers geographically. This case did not really involve a jurisdictional issue. The issue in the case was whether the Italian defendant had impermissibly published its magazine in the U.S. by displaying the magazine on its website, located in Italy. The N.Y. district court said, "If technology cannot identify the country of origin of e-mail addresses, these passwords and user IDs should be sent by mail. Only in this way can the Court be assured that United States users are not accidentally permitted access to PLAYMEN Lite." *Id.* at 1044. The *Playboy* court's comment brings to mind Professor Dan Burk's article, *supra* note 8, at 1107, wherein he states that the technology is not available to filter out people from the Internet based on their geography. As Professor Burk noted, requiring E-commerce providers to employ backup means to verify the geographical location of the user via telephone or mail negates the inherent value of the Internet as an efficient means of doing business. An Internet search on the Internet search engine www.google.com for the term "Playmen" found "Playmen Magazine" still online and accessible from the U.S. at <http://www.lfvw.com/playmen.htm> (last visited Mar. 22, 2001). However, none of the pictures were visible and the site contained a disclaimer which said,

The above magazine cover is shown for historical purposes only. The operator of this website has no connection with Playmen magazine or Playboy magazine and no rights are implied. There is no connection between Playmen magazine of Italy and Playboy magazine of the United States. For more beautiful Italian women Playboy publishes an Italian version that is available for import to the US.

Internet. Therefore, the price of operating within a jurisdiction which demands geographic shielding may be more than some companies are willing to bear. Of course, it is possible that companies which have an Internet presence may not have a choice. Some foreign courts may use the international effects doctrine to exercise jurisdiction based on the effects of the company's web page in the foreign country.²²⁰ However, the one foreign case on point involves a U.S. defendant that had substantial ties with France in the form of a subsidiary operation. As long as such a defendant has such connections in the foreign country, it may have to decide between either severing its connections or complying with the foreign court's decision. Thus far there is no documented case where a U.S. company's Internet presence alone has subjected it to jurisdiction in a foreign country.

Id. The unblocked Italian language version of Playmen could be viewed at http://www.eracle.it/erotismo/riviste/calendario_2001_playmen.asp (last visited Mar. 22, 2001). The accessibility of this page in the U.S. would not violate the court's injunction, which only prohibited Playmen from publishing an English language version of its magazine. *Playboy Enter.*, 939 F. Supp at 1042.

²²⁰ If a company's Internet presence violates the law of a nation where it can be accessed, the company authorities could be arrested if they visit the country. According to Dr. Ulrich Sieber, a leading German authority on German Internet regulation, German authorities may arrest people who violate its laws by publishing material illegal in Germany on the Internet. See Lorenz-Lorenz Mayer, Interview with Criminal Law Professor Dr. Ulrich Sieber, SPIEGEL ONLINE (Christopher Kuner trans.), at <http://www.kuner.com/main.html> (last visited Feb. 16, 2001). Dr. Sieber discusses Germany's ability to take criminal action against the Dutch group "Solidarity for Political Prisoners," or SPG, which put an illegal issue of a German magazine on the Internet. He says that in order for Germany to get Dutch authorities to cooperate in the prosecution, the act of putting the magazine on the Internet would have to be a crime in the Netherlands as well as in Germany. However, if a member of SPG happens to visit Germany, that person could be arrested and prosecuted. If the managing director of the server on which the illegal material is located happens to visit Germany, he would at least be investigated by German authorities and could be arrested. Dr. Sieber believes that taking criminal action against Internet Service Providers harms international business in Germany, and what he believes is really needed is an international agreement on minimum standards for criminal statements on the Internet. It is doubtful such an international agreement will soon come to pass. What constitutes a criminal statement in Germany and what constitutes a criminal statement in the U.S. are worlds apart.

CHOICE-OF-LAW DOCTRINE

Even if such a company does face jurisdiction in a foreign court, or in another state court, it may be able to gain an advantage using choice-of-law doctrine. In accordance with this doctrine, the nonresident defendant would ask the court to apply the defendant's own state law. Choice-of-law doctrine has not yet been applied to Internet cases, but it would be useful. An Internet defendant can argue for the use of its own state law. This argument will accomplish two things. First, it may provide the defendant with more legal certainty if the defendant is familiar with his own state law. Second, if the court doesn't apply the defendant's state law or applies it incorrectly, the court's action could serve as a basis to keep the defendant's home court from enforcing the judgment. Applying the incorrect law is a violation of the due process clause.²²¹ U.S. state courts will not enforce a judgment rendered in violation of due process. The due process violation could spring either from a faulty assumption of personal jurisdiction or from a deficient choice-of-law analysis. So, even if a U.S. defendant must face jurisdiction in a foreign court and does not prevail, he may be able to keep the judgment from being enforced. Before the defendant gets the benefit of such a favorable enforcement analysis, there has to be a due process problem with the foreign court case. This thesis has already discussed personal jurisdiction due process, and now it will discuss choice-of-law due process, so the reader understands how due process problems may arise in this area.

²²¹t SCOLES ET. AL., *supra* note 211, §3.30, at 168.. AL., *supra* note 7,

Choice-of-law Analysis Within The U.S.

Due process problems involving choice-of-law within the U.S. rarely arise. There are no Internet cases yet where a court has applied a choice-of-law analysis, much less held that an insufficient choice-of-law analysis violates due process. Internet jurisdiction is still evolving, and seems ripe for application of choice-of-law doctrine (also called conflicts doctrine) because of the geographical separation of the parties involved. It is therefore instructional to give an overview of choice-of-law doctrine in order to analyze how a court might decide such an issue in an Internet case.

According to traditional U.S. conflicts caselaw, a court must not only decide whether it is fair to take jurisdiction over a case to satisfy due process, it must also decide whether it is fair to apply the law of that state to the dispute. In order to apply the law of the forum state to the dispute, there must be a sufficient nexus between the forum state and the transaction at issue.²²² Even if there is another state with a closer connection to the controversy, the forum state can hear the case as long as there is at least a “significant contact” between the forum state and the controversy.²²³ The state doesn’t necessarily have to have the closest connection to the controversy, it just has to have a connection. However, the Supreme Court will strike down cases where the defendant could not expect that the law

²²² *Id.*

²²³ Scott Fruewald, *Constitutional Constraints On State Choice-of-law*, 24 DAYTON L. REV. 39, 40 (Fall, 1998), citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

of a particular forum would be applied to him.²²⁴ Like the personal jurisdiction analysis, conflicts-of-law analysis turns on fairness and the reasonable expectations of the defendant. The question the court will ask is whether the defendant has had the opportunity to structure his or her conduct in a particular manner.²²⁵ Sometimes even when a plaintiff sues the defendant in his own home state, the court must apply the law of the plaintiff's domicile, if that is where the transaction at issue took place. For example, in *Young v. Masci*,²²⁶ the New Jersey court applied a New York law when a New York plaintiff sued a New Jersey defendant, because New York is where the automobile accident at issue took place. Often, however, states will define their connections with a particular transaction broadly enough so that they apply their own state law rather than the law of another state or country.²²⁷ There is no real check upon their behavior, short of taking the case to the Supreme Court.

Because U.S. state courts have broad latitude to apply their own state law, it is not likely that they will apply another's state's law to an Internet conflict. As long as state courts can find a significant contact between their state and the conflict, then they will likely apply their own state law. However, as will be discussed in greater detail later, the forum court will

²²⁴ See *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 181 (1936). In *Yates*, the plaintiff was a widow who was trying to collect on her deceased husband's life insurance policy against the defendant life insurance company. The insured and his wife had purchased the policy while they were living in New York, paid the premiums in New York, and after the insured died, his wife moved to Florida. When she couldn't collect on the insurance policy, she sued the insurance company in the state of Georgia. Georgia applied its own law to the transaction. The Supreme Court disagreed with the Georgia court, stating that it should have applied New York law as that where the parties were living when they formed the contract.

²²⁵ See *Rosenthal v. Warren*, 475 F.2d 438, 444 (2d Cir.1973), cert. denied 414 U.S. 856 (1973). In this case the federal court refused to apply New York law when a New York plaintiff sued a Massachusetts doctor in New York. The plaintiff was the wife of a patient who had died after visiting the Massachusetts and being operated on in Massachusetts. The court focused on the fact that the doctor treated patients from a number of states and could not expect to have to comply with the liability standards in all their states.

²²⁶ *Young v. Masci*, 289 U.S. 253, 260-61 (1933).

likely have to enforce its judgment in the defendant's home state. In the enforcement action, the defendant can argue to the court in its home state that the forum court did not apply the law of the defendant's home state when it should have.²²⁸ If the home court agrees with the defendant, then it can refuse to enforce the judgment based on a violation of the due process clause.

Choice-of-law Analysis In Foreign Countries

Foreign courts do not, of course, consider the due process clause when deciding which law to apply, or whether to exercise jurisdiction. It is useful to examine the practice of foreign courts in this arena to determine whether a U.S.-based Internet defendant could prevent its home state from enforcing the foreign judgment on due process grounds.

Generally, under international conflicts of law analysis, a foreign nation's court will weigh the interests of the competing countries to determine whether it has the authority to apply its own law to a conflict involving parties from different countries.²²⁹ The court will also examine the nature of the dispute, because the rules on choice-of-law vary depending upon whether the action in question is a tort or a contract dispute, for example.²³⁰ Then, the court

²²⁷ SCOLES ET. AL., *supra* note 211, §3.30, at 168.

²²⁸ There is very little caselaw supporting the notion that a state court would refuse to enforce a sister state judgment based on a violation of due process by applying the wrong law to the dispute. There is only the quotation from *Pennoyer v. Neff*, "A decision rendered in violation of due process is void in the rendering state and not entitled to full faith and credit elsewhere." *Pennoyer v. Neff*, 95 U.S. 714, 733 (1828). There is more authority for the notion that a foreign country court which applied the wrong law wouldn't get its judgment enforced in the U.S. court. *See generally* SCOLES ET AL., *supra* note 7, at chapters 7-9.

²²⁹ Darrel Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH.L.REV. 69 (1998), available at <http://www.mtlr.org/volfour/menthe.html>.

²³⁰ *See generally* SCOLES ET AL., *supra* note 7, chapters 7-9.

must decide whether to use its own choice-of-law rules or apply those arising out of an international agreement.²³¹ Germany would apply its own choice-of-law rules, for example, to determine whether to apply its laws or those of some other country, unless it had signed a treaty providing otherwise. Within the European Union countries, including Germany, choice-of-law rules are contained in regulations which are directly applicable to the member states.²³² If the person or corporation being sued in a European country is not from a European Union country, the regulations and other European Union treaties would not be applicable to it.²³³ If the person being sued in the foreign country was American, that defendant should look to see if there are any treaties between that foreign country and the U.S. on which choice-of-law rules to apply.

Of course, it is always possible that parties to a contract, at least, have included a provision in the contract as to which law will be applied in case of a dispute.²³⁴ The Restatement (Second) of Conflicts of Laws notes that courts often adhere to these clauses in disputes, as they establish predictability in international business dealings.²³⁵

Internet defendants need predictability in this arena. Choice-of-law in Internet transactions is an excellent subject for an international treaty. A choice-of-law treaty could

²³¹ Peter P. Swire, *Of Elephants, Mice and Privacy: International Choice-of-law and the Internet*, 32 INT'L LAW 991, 995 (Winter, 1998)

²³² *Id.*

²³³ *Id.* at 996.

²³⁴ Note: *Conflicts on the Net: Choice-of-law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75, 98 (1996).

²³⁵ See Restatement (Second) Conflict of Laws, §80 (1988).

inject much-needed clarity into international Internet transactions. That is the subject of a different thesis, however. The point of this discussion is to demonstrate to the reader that it is unlikely under the current state of conflicts analysis that either a foreign court or another state court will apply the law from a defendant's U.S. state to an Internet dispute. If the defendant's home state court disagrees with the foreign country or other state court's decision not to apply home state law, then the U.S. state court could possibly refuse to enforce the judgment, as delineated below. It is much more likely that a state court will refuse to enforce a foreign country court judgment than a sister state court judgment.

ENFORCEMENT OF JUDGMENTS

Even if a court takes jurisdiction over a non-resident Internet defendant, the court must be able to enforce its judgment if the judgment is to have any effect. If the defendant's property is located in the forum state or country, then the court may be able to enforce its judgment by seizing this property if it is related to the dispute.²³⁶ However, an Internet defendant may not have any property in the forum state. At least one scholar has maintained that,

Internet technologies decrease, rather than increase, the likelihood of valuable assets being located in the jurisdiction of the plaintiff. Even if an argument could be sustained that that an Internet server used to disseminate the harmful information is vicariously "present" in the forum state, turning the property into money requires the practical exercise of dominion and control over something that can be sold, and vicarious presence is not sufficient.²³⁷

²³⁶ See Perritt, *supra* note 39, at 16-17.

If the plaintiff wants to get the judgment enforced in the defendant's home state, he may have problems. A U.S. state court is required by the Full Faith and Credit Clause of the Constitution²³⁸ to recognize a judgment from another state court.²³⁹ A court does not automatically apply the judgment of the other court like an automaton, however, but instead conducts its own analysis to make sure that the jurisdiction over the defendant comported with due process. If the second court concludes that the first state court did not have jurisdiction over the defendant to begin with, or applied the wrong law to the dispute, the second court may conclude that the judgment is not entitled to full faith and credit and thus won't enforce it.²⁴⁰ However, this protection is limited. Most often the second state court will only conclude that the judgment is not entitled to full faith and credit when the jurisdictional issue was not raised at the first state court proceeding, and there was no jurisdiction.²⁴¹

²³⁷ *Id.* at 17.

²³⁸ U.S. CONST. art. IV, § 1, requiring states to give full faith and credit to acts, records and proceedings "of every other state."

²³⁹ SCOLES ET. AL, *supra* note 211, §24.12, at 1161-63.

²⁴⁰ *Pennoyer v. Neff*, 95 U.S. 714, 733 (1828). *See also* *Durfee Et Ux. v. Duke*, 375 U.S. 106, 111-112 (1963) (holding that one state is only required to give full faith and credit to another state court's judgment if the court which seeks enforcement had personal jurisdiction over the defendant, unless the court which seeks enforcement litigated the issue of personal jurisdiction already). U.S. courts are much more likely to refuse enforcement based on incorrect personal jurisdiction than incorrect application of law in a conflicts analysis.

²⁴¹ *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 524-525 (1931). The Court in *Baldwin* states,

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

Id. The Court goes on to state,

Judgments from a foreign country aren't entitled to full faith and credit.²⁴² State courts within the U.S. will enforce judgments from courts outside the U.S. as long as the court which rendered the opinion had jurisdiction.²⁴³ Some states also require that the foreign court proceeding comport with U.S. due process, which could mean that foreign courts which applied the wrong law to the case couldn't get their judgment enforced.²⁴⁴ Courts within the U.S. measure foreign court jurisdiction in terms of due process being generally satisfied.²⁴⁵ Due process is defined by the standards of the state court in which the foreign court seeks to enforce the judgment.²⁴⁶ The home state court will measure the

The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction.

Id. This language implies that a potentially successful course of action for a nonresident defendant being sued in a state court would be to stay home, not put in an appearance in at the adjudicating court, wait for the default judgment, and hope that his state court agreed that the forum court had no personal jurisdiction over him.

²⁴² Goldsmith, *supra* note 116, at 1219. Goldsmith states,

In contrast to the domestic interstate context, customary international law imposes few enforceable controls on a country's assertion of personal jurisdiction, and there are few treaties on the subject. However, also in contrast to domestic law, there is no full faith and credit obligation to enforce foreign judgments in the international sphere. If one country exercises personal jurisdiction on an exorbitant basis, the resulting judgment is unlikely to be enforced in another country. *Id.*

²⁴³ Scoles, *supra* note 211, §24.42, at 1205-06.

²⁴⁴ See *Banque Libanaise v. Khreich* 915 F.2d 1000, 1004 (5th Cir. 1990). Here the Fifth Circuit cited the Texas law dictating when recognition of foreign country would not be granted. One of the grounds for denying recognition was "[T]he judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process law." *Id.* There are no cases on point stating that a U.S. state court would not enforce a sister state judgment that applied the incorrect law in a conflicts analysis, even though this would be a violation of the due process clause.

²⁴⁵ SCOLES ET AL., *supra* note 7, §24.42, at 1205-06.

²⁴⁶ *Id.*

contacts that the adjudicating country had with the state where the defendant resides.²⁴⁷

Sometimes recognition treaties apply, providing reciprocal recognition of judgments in certain areas such as money judgments.²⁴⁸ If there is no such treaty, and the foreign court doesn't enforce U.S. court judgments, then it is possible the U.S. court won't enforce the foreign treaty.²⁴⁹

Courts in foreign countries operate in much the same way as courts in the U.S. with regard to enforcement of foreign judgments. As long as the foreign court had jurisdiction as measured by the enforcing country's courts, then the enforcing country will give effect to the judgment.²⁵⁰ Some countries, such as England, are more likely to give effect to foreign judgments than others.²⁵¹ Some countries require that the requesting country have reciprocal enforcement provisions in its own laws before it will enforce the judgment of the requesting state.²⁵² Because states have different practices with regard to enforcement of foreign

²⁴⁷ See *Cherun v. Frishman*, 236 F.Supp. 292, 298 (D.D.C. 1964). The Federal District Court was satisfied in this case that the U.S. defendant had minimum contacts with Canada where he owned land which he sold to the Canadian plaintiff, and therefore the court enforced a Canadian court's judgment for the plaintiff.

²⁴⁸ R.H. GRAVESON, *CONFLICT OF LAWS* 619 (7th ed. 1974); J.G. CASTEL, *CANADIAN CONFLICT OF LAWS* §§ 145-50 (2d ed. 1986). Recognition treaties are treaties which specify jurisdictional bases which will be recognized by the enforcing treaty partner. They provide some certainty to the enforcement of judgments.

²⁴⁹ See *Hilton v. Guyot*, 159 U.S. 113, 227 (1895). When a U.S. defendant argued that a French judgment against him should not be enforced within the U.S., the Supreme Court agreed because France did not enforce U.S. judgments. The Court stated that, "The suggestion that the comity of nations requires conclusive force to be given to foreign judgments, inasmuch as otherwise they will not give like force to our judgments, is wholly insufficient." *Id.* See also *McChord v. Jet Spray International*, 874 F. Supp. 436, 439 (D.Mass. 1994), where the Federal District Court applied Massachusetts law which said that Massachusetts would only enforce the judgments of those countries which enforced Massachusetts judgments.

²⁵⁰ SCOLES ET AL., *supra* note 211, §24.38, at 1194-99.

²⁵¹ *Id.*

²⁵² See 2 A.A. EHRENZWEIG & E. JAYME, *PRIVATE INTERNATIONAL LAW* 53-54 (1973) (discussing reciprocity requirements).

judgments within that state, the foreign country may examine the record of that particular requesting U.S. state when deciding whether to effect the judgment made by that state's court.²⁵³

Defendants get a second chance from enforcement law. The Due Process clause will once again protect the defendant by requiring that the defendant's home state perform a due process analysis before enforcing the judgment. This requirement will not likely protect the Internet defendant much from a sister-state judgment unless jurisdiction was not addressed, but it will give more protection against a judgment from a foreign country. However, the state that refuses to give effect to a judgment against an Internet defendant must realize that the foreign country will then likely not enforce judgments from that state in its country. The foreign country can also enforce the judgment within its own country, if the defendant has any assets located there. France could have put Yahoo France out of business by refusing to allow its telephone nodes in France to operate, nodes which connected European subscribers to the Internet. Without local telephone nodes to connect to the Internet, European customers would just use another Internet Service Provider, because it wouldn't be worth it to pay long distance charges to connect to banished ones. Therefore, although Yahoo Inc. disputed jurisdiction, the fact that the French court had potent enforcement tools made it comply with the French court's decision by taking Nazi memorabilia off its auction site.²⁵⁴ Unlike Yahoo, many Internet businesses located in the U.S. are small merchants with no foreign assets.

²⁵³ See Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 256 (1991). See also SCOLES, ET AL., *supra* note 7, §24.38, at 1194-99.

²⁵⁴ Of course, eventually France could run out of Internet Service Providers if French courts hold them responsible for the content of the Internet.

They may well be able to avoid the effect of a foreign judgment if the U.S. merchant's state court thinks the foreign judgment violates due process.

CONCLUSION

U.S. courts must comply with the Due Process clause when exercising personal jurisdiction over non-resident defendants. Traditional caselaw combined with Internet scenarios tends to make the application of personal jurisdiction law rather tortuous in Internet cases. Courts asserting jurisdiction based simply on a nonresident defendant's web page, and perhaps an 800 number, lack sufficient minimum contacts to comply with due process. Courts can exercise personal jurisdiction properly over nonresident Internet defendants by using the *Calder* "effects" test when the defendant has allegedly engaged in some malfeasant act. Forum courts can also exercise jurisdiction properly by demonstrating that the defendant's minimum contacts with the forum state were of the proper quality, and that the lawsuit arose from these contacts. Courts can combine these tests in the right circumstances. Globally, foreign country courts have asserted jurisdiction over U.S. Internet defendants based on the international effects doctrine, but this doctrine may not comply with U.S. notions of due process. Even if foreign courts take jurisdiction over an Internet dispute, they will likely not be able to enforce their judgment within the U.S. without satisfying the due process rules. If an Internet defendant finds himself in a foreign country or state court, he can always try to gain some certainty by arguing for the application of his own state law. If the forum court applies conflict of law or personal jurisdiction law incorrectly, defendants may be able to keep the judgment from being enforced based again on the Due Process

clause, although this mainly applies just to personal jurisdiction law and foreign courts. If the Internet company is small, and does not have any assets located in the foreign country, then it may not care as much about a foreign suit as a big company like Yahoo or Compuserve would. Foreign countries should be careful about what they ask the big Internet companies for, however. If the burdens of operating in a foreign country become too onerous, Internet Service Providers and other large Internet companies may leave the country of their own accord, cutting the country off from the Internet. Checkered though it is, the Due Process clause still provides Internet defendants some protections. Foreign courts often don't provide even the limited protection of the Due Process clause. Domestically, a decision by the U.S. Supreme Court would both unify federal district court decisions and likely narrow Internet jurisdiction. Internationally, a jurisdiction treaty could do much to ease tensions about the Internet. The Internet is a frontier in a world with few frontiers left. Just as in the American West, however, frontiers often require the presence of the law to encourage settlers. Settlers on the Internet are those people who will use the Internet to make their lives and businesses more efficient. Judges are often asked to fill the role of Internet lawmaker, and must carefully develop a body of jurisprudence that incorporates traditional personal jurisdiction caselaw. By diligently incorporating traditional caselaw, courts provide Internet defendants the predictability due process requires.